UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, ET AL., :
Plaintiffs, :
vs. : Docket No. CA 13-623
KATHLEEN SEBELIUS, ET AL., : Washington, D.C.
: Monday, October 21, 2013
: 10:05 a.m.
Defendants. :
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TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Official Court Reporter
United States District Court
District of Columbia
333 Constitution Avenue, NW
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Proceedings recorded by machine shorthand, transcript produced by computer-aided transcription.

1 P-R-O-C-E-E-D-I-N-G-S

2 THE DEPUTY CLERK: Civil Action number 13-623,

3 Jacqueline Halbig, et al versus Kathleen Sebelius, et al.

4 Counsel, please come forward and identify yourselves for

5 the record.

6 MR. CARVIN: Thank you, Your Honor, Michael Carvin

7 for the plaintiffs. With me today is Jacob Roth and Jonathan

8 Berry.

9 THE COURT: Thank you, Mr. Carvin.

10 MR. MCELVAIN: Good morning, Joel McElvain for the

11 defendants, with me today is Sheila Lieber.

12 THE COURT: All right. And from this point forward

13 to help out the Court Reporter if everybody will speak at the

14 microphone and come to the podium.

15 So we're here on two motions. One is the Government's

16 motion to dismiss the complaint, dismiss the case and the other

17 is plaintiffs' motion for a preliminary injunction. Obviously,

18 if the case were dismissed, there wouldn't be an injunction.

19 So I don't know whether you all have discussed the order

20 in which you want to proceed.

21 MR. CARVIN: Your Honor, we briefly chatted. It's

22 obviously up to the Court's discretion. I think we both felt

23 that the threshold issue might go first before, be the first

24 one.

25 THE COURT: That will be helpful.

1 Mr. McElvain.

2 MR. MCELVAIN: Good morning, Your Honor, may it

3 please the Court.

4 When it passed the Affordable Care Act, Congress enacted

5 a comprehensive nationwide scheme to make affordable health

6 coverage available for all citizens.

7 The plaintiffs' theory is fundamentally contrary to the

8 tax and the purpose of the Affordable Care Act and it should be

9 rejected. However, this case is not the right forum to do so

10 because there are multiple threshold barriers to the suit.

11 First and foremost, the plaintiffs lack Article III

12 standing to proceed. Taking in particular the claims of the

13 individual plaintiffs and in particular the claim of David

14 Klemencic who is the only individual who has attempted to show

15 standing. It is quite clear that he has suffered no injury at

16 all from the Treasury regulation that he aims to challenge

17 here.

18 In fact, now that the premiums are in on the Federal

19 exchanges, it is clear that he would pay nothing.

20 THE COURT: Well, that's not what he says. He says

21 he'd pay $18 a month.

22 MR. MCELVAIN: Well, actually we have initially

23 provided information to the Court saying that our estimates as

24 of the date of our opposition briefs September 27th, we thought

25 at most $18.

1 Now that the rates have finally been calculated, we
2 submitted a supplemental declaration to the Court on Friday
3 showing that in fact the numbers are zero.
4 THE COURT: Why isn't that a disputed issue of fact
5 that would have to be resolved at the summary judgment stage?
6 MR. MCELVAIN: Because the number and that is the
7 number that he will pay.
8 But I'm perfectly willing to accept the $18, either $18
9 or zero is not a fact to our argument. The point is that he
10 would pay hundreds of dollars less for a comprehensive plan, a
11 bronze plan in Exchange than a catastrophic plan that he claims
12 he was interested in.
13 Now at the last minute he claims well, I don't want
14 insurance at all. I simply do not want to buy insurance. But
15 that's not the way they were proceeding at the outset of this
16 case and this Court judges Article II standing on the basis of
17 third claims --
18 THE COURT: When you say at the outset, is there
19 something in the complaint itself that you're relying on?
20 MR. MCELVAIN: In the complaint itself and in
21 Mr. Klemencic's declaration he said I not interested in
22 catastrophic coverage. My claim of injury is that I am
23 prevented from buying catastrophic coverage because I can only
24 do so with insurance if other insurance is not affordable for
25 me. That's why I'm harmed by these tax credits being given to

1 me.

2 That's their theory of standing, but it doesn't work

3 because the catastrophic coverage that he claimed or at least

4 initially claimed that he was interested in getting is actually

5 more expensive for less generous coverage than the insurance

6 that is available to him for free on the Exchange.

7 So there is simply no Article III injury in fact by the

8 provision of free insurance to Mr. Klemencic.

9 THE COURT: So it's available to him for free if he

10 gets the subsidy?

11 MR. MCELVAIN: Correct.

12 Just to follow up on that point. The notion that

13 there's something material about being denied, possibility by

14 him suffering a catastrophic plan really is no injury at all.

15 Every benefit that he could get from the catastrophic plan he

16 gets from the Bronze plan and more on better terms because it

17 will start covering him from dollar one as opposed to him first

18 incurring $6500 or so out-of-pocket costs and benefits of

19 affordable care. The better term again or what's cheaper given

20 the fact that he has the subsidies. So again he suffers no

21 injury in fact whatsoever.

22 Now as to the other group of plaintiffs, the business

23 plaintiffs, they also lack Article III standing for a slightly

24 different reason. Their claim of standing is that they suffer

25 potential injury and that they will potentially face the tax

1 under the Affordable Care Act for large employers that kicks in
2 if one or more of the employees gets the tax credit under the
3 exchanges. Their theory is well, we want to come in and we
4 want a declaration that our employees are not eligible for
5 coverage and that will prevent the possibility that we will
6 later get this tax.
7 But they can't get that relief here because this Court
8 doesn't have the power to extinguish those employees' rights in
9 a federal proceeding to go forward and seek their own tax
10 credit.
11 THE COURT: What's the difference between what
12 they're saying here and what the Fourth Circuit ruled in
13 Liberty University?
14 MR. MCELVAIN: Liberty University the Court, the
15 plaintiff there was seeking a declaration that employer tax
16 Section 4980 H was unconstitutional, just couldn't be applied
17 at all.
18 THE COURT: So in terms of the nature of the harm
19 that the employer in Liberty University was alleging, is there
20 any difference between what the Fourth Circuit said about the
21 injury they suffered and the injury that the employer,
22 plaintiffs claim here?
23 MR. MCELVAIN: Well, the difference here is they're
24 not raising a direct challenge to Section 4980 H. Their entire
25 claim depends on their ability to extinguish the employees'

1 right to seek the credit.
2 This is very different from Liberty University. That
3 sort of claim was not at issue there. So the only way that the
4 employers could gain relief from the threat that they fear from
5 a future tax infringement turns on their ability to prevent the
6 employees from seeking the tax structure. Because 4980 H, the
7 employer tax, would kick in as a matter of law if more than one
8 of the employees get the credit but they can't extinguish those
9 employees' right.
10 Now what the plaintiffs argue here is well, we're
11 seeking to overturn a regulation, so the Court can set aside
12 the regulation and that would show that in fact we would win.
13 But if you look at it a little more closely that claim doesn't
14 work because the Treasury regulation the plaintiffs challenge
15 here is an interpretive regulation interpreting Section 36B to
16 say that the tax credits are available.
17 Even if the Court overturned the regulation with
18 nationwide application which we don't think that the Court has
19 power to do but we can leave that question aside, even if the
20 Court overturns the regulation completely that wouldn't
21 extinguish the plaintiffs' claim because they could still come
22 forward with their own claim, say fine, it's no regulation, but
23 our interpretation of the Affordable Care Act they're entitled
24 to the tax credit and they could bring their own suit saying
25 please give us tax credits.

1 THE COURT: You are saying even if this was a
2 straightforward and it's not a straightforward APA case a
3 challenge to a regulation is arbitrary and capricious or
4 inconsistent with the language of the statute and therefore,
5 contrary to law and I were to reach that conclusion that you
6 would say we don't care what the Court said that this
7 regulation is contrary to the law, we still have the statute
8 and here's how we read the statute.
9 MR. MCELVAIN: Well, I don't want to get to the
10 remedy stage because we are not there. But if the Court issued
11 an injunction then, you know, we of course would follow the
12 injunction.
13 But the Court cannot enjoin the employees who are out
14 there third parties not present in this courtroom. And they
15 would come to the courtroom and say under the statute we are
16 entitled to use the tax credits so give us the tax credits and
17 maybe we couldn't as a matter of first course depending on what
18 sort of injunction the Court should hear.
19 But the plaintiffs could still bring their own claim and
20 argue they would win that second lawsuit. But in --
21 THE COURT: Isn't it a normal thing in an APA case
22 not to have an injunction but vacate the regulation and just
23 saying maybe a declaratory judgment but basically saying this
24 regulation is arbitrary and capricious and contrary to law and
25 therefore, it's vacated and that's the end of it or you can

1 try to rewrite it, but so what would -- you said if there were
2 an injunction you would follow the injunction, but what would
3 the injunction say?  The injunction can't say you can't collect
4 taxes.  The injunction can only say you can't apply the
5 regulation.
6           MR. MCELVAIN:  Right.  And so even if we didn't have
7 the regulation anymore, then the second thing that happens is
8 the employee comes with their own claims saying that we are
9 entitled to these tax credits.
10        I have been trying to think of what would the
11 Government's brief look like in the second case.  It would be
12 something like well, we think that you are right, Mr. Employee.
13 In fact, we use to have a regulation that said you were right.
14 It's been vacated and we can't rely on the regulation but if
15 you ask us our belief in our hearts, yes.
16           THE COURT:  In your hearts?  In your hearts.
17           MR. MCELVAIN:  Yes.
18           THE COURT:  You're lawyers.  You can take that
19 comment several different ways.
20           MR. MCELVAIN:  Our hearts will -- I don't know how
21 that litigation will proceed but the point is that the
22 employees can still come forward and say we have our own
23 reading of the act and we are entitled to our statute.
24        There's a wealth of authority that you do not get past
25 the Redressability threshold when all you're trying to do is

1 litigate one issue that might come up in another proceeding.
2 All the plaintiffs here are trying to do is the fact I guess
3 the level of Chevron deference that the Treasury regulation
4 would get in a lawsuit brought by the employees.
5 THE COURT: It wouldn't get any deference if it was
6 vacated.
7 MR. MCELVAIN: That's my point. It would be a side
8 issue that would be coming forward in the second proceeding
9 which is are plaintiffs in fact entitled to the tax credits or
10 not.
11 So for that reason it simply cannot gain relief here
12 because they'd still be under the threat of a tax assessment if
13 an employee comes forward with their claim in the next
14 proceeding.
15 I could address the prudential standing issue.
16 THE COURT: Okay.
17 MR. MCELVAIN: So there are two issues with respect
18 to prudential standing. One issue effects all of the
19 plaintiffs. The other issue effects the business plaintiffs in
20 particular.
21 First, the plaintiffs do not fall within the zone
22 interest of the statute.
23 THE COURT: You've got to realize what a battle to
24 persuade me because in my notes I wrote this is a silly
25 argument.

1 MR. MCELVAIN: Well, I don't think it's silly. I do
2 recognize that the zone interest assessment is usually very
3 easy for a plaintiff to meet.
4 But the issue here is they in fact are asserting a
5 purpose that is directly contrary to what the Congress purpose
6 in enacting the Affordable Care Act was. So even though it is
7 a very rare case where the zone interest may not work, this is
8 one of those cases where they are proceeding for 180 degrees
9 opposite the reason the Congress enacted.
10 THE COURT: So does that mean that anybody who ever
11 challenges the constitutionality of lawfulness of a statute or
12 regulation is never within the zone of interest because they're
13 trying to overturn something that was passed by Congress and
14 only people that are trying to get the benefit of it are in the
15 zone interest?
16 MR. MCELVAIN: No. First of all, it's a
17 constitutional challenge if --
18 THE COURT: Well, put that aside.
19 MR. MCELVAIN: And another case if somebody is
20 challenging -- there are multiple cases where somebody could be
21 within the zone of interest for any number of challenges. It's
22 like I said not a hard challenge to meet. You just have to be
23 a plaintiff that is reasonably foreseeable as sort of a
24 plaintiff who might vindicate the interest that Congress had.
25 But one very narrow circumstance where the zone of

1 interest test very definitely applies is when you are asserting
2 a purpose that is directly contrary to what Congress' purpose
3 was.
4 Congress was quite explicit as to why it enacted Section
5 36B. We are enacting this to make insurance more affordable
6 and to offset the cost of health insurance premiums on
7 exchanges. The interest that the plaintiffs are asserting here
8 is that they, they frankly admitted it. They want to make
9 insurance more unaffordable and we don't want the cost of
10 insurance to be offset. So it's directly contrary to Congress'
11 purpose.
12 Again, the narrow test does not apply very often, but
13 this is one of the rare cases where it applies where the
14 plaintiffs have so frankly and so directly contrary to the
15 purposes of Congress in enacting the statute in particular.
16 And there's a wealth of examples of legislative history
17 where even the House said not only the purpose is to make
18 insurance more affordable, but the purpose of making these
19 credits is in fact key to the larger operation of the statute.
20 Turning also to the, to the next issue in terms of
21 prudential standing. The employer plaintiffs here, as we've
22 already discussed, their claim depends on their asserted right
23 to adjudicate the tax liabilities of parties who are not before
24 the Court, the employees who are not parties in this
25 proceeding.

1 There is a wealth of authority that Federal courts do
2 not allow third parties to adjudicate, to allow third parties
3 to challenge the tax liabilities of other taxpayers. And this
4 applies even where the third party who comes in the court
5 actually would be effected by the answer to the question.
6 For example, if you have property that the Federal tax
7 lien has landed on because of somebody else's tax debt. They
8 incurred the tax debt, then transferred the property to you or
9 what have you. You are allowed to challenge the lien if the
10 lien is invalid or what have you anything that relates to your
11 particular place with the Government. You're permitted to
12 challenge that.
13 One thing that is absolutely ironclad that you cannot do
14 is go and look underneath the tax assessment and say oh,
15 actually that federal tax debt was never owed in the first
16 place so therefore the lien should never have arisen. So in
17 the case where it's crystal clear that a party has an interest
18 in adjudicating that other person's tax relationship to the
19 Government they can't do so. It is just absolutely ironclad.
20 It has been recognized over and over by the Federal court as a
21 having a fundamental principle of how the revenue collection
22 process works.
23 THE COURT: But aren't the cases that you rely on all
24 cases where the plaintiffs have no real stake in the situation,
25 had no real injury resulting from the tax impact on the absent

1 third party.

2 Whereas in this case the employer plaintiffs argue that

3 they are suffering injury. You may not agree with their injury

4 analysis or that it's a sufficient injury to meet all of these

5 other threshold things that have to be met, but aren't they

6 different from the plaintiffs in the cases you cite because

7 those plaintiffs unlike these plaintiffs did not allege

8 themselves a real stake or a real injury to themselves?

9 MR. MCELVAIN: No, I disagree with that, Your Honor.

10 There are numerous cases where the plaintiffs have alleged they

11 have a real stake.

12 Take for example, United States v. Formige,

13 F-O-R-M-I-G-E, cited in our briefs.

14 THE COURT: Say it again.

15 MR. MCELVAIN: F-O-R-M-I-G-E, I believe it's Formige.

16 THE COURT: All right, it's in the brief?

17 MR. MCELVAIN: Yes. There, this is actually the

18 circumstance I was just describing. There was a taxpayer who

19 owed a tax debt, who skipped the country, transferred her

20 property to her daughters and skipped the country so the

21 taxpayer was gone, but the tax lien attached to the property

22 that she had transferred.

23 The daughter was the new owner of the property subject

24 to the Federal tax lien brought a challenge saying I want to

25 litigate the underlying tax debt and I have a genuine personal

1 stake in this because if I can show that the underlying tax
2 debt does not apply, then I win. There's no lien and I get the
3 property free and clear.
4 The Court said you're allowed to litigate the procedural
5 validity of the lien that's acknowledged, anything that has to
6 do specifically with you, but you cannot challenge the
7 underlying tax liability of the third party that is not before
8 the Court. This is a core principle Internal Revenue code,
9 matters relating to the underlying liability are between the
10 taxpayer and the Government, not for interposition between
11 suits brought by third parties.
12 So there are numerous authorities where plaintiffs
13 actually allege that they actually had real injuries at stake,
14 but still the principle part of their suit.
15 Now what the plaintiffs have done they cite Hibbs v.
16 Winn saying oh, well there's numerous cases where suits have
17 been allowed, but their quotation was incomplete and the
18 reference in the quotation was actually to language referring
19 to constitutional challenges in cases involving State action
20 issues. There was the Tax Injunction Act which the separate
21 statute Government and federal courts and State statutes.
22 So the principles are quite different between cases
23 where core constitutional issues may be at stake such as the
24 First Amendment or the 14th Amendment and just ordinary
25 statutory disputes over who owes what sort of liability. As in

1 the case Charles v. UN, Levin v. Congress Energy (sic) also
2 cited in our briefs.
3 So the plaintiffs have attempted to deny that this
4 principle of not challenging the third party tax liability even
5 exist, but the case they cite for the proposition is simply
6 wrong and if you read the language we have cited very carefully
7 does not apply to this circumstance of this lawsuit in
8 particular.
9 One further point on that this rule applies to
10 particular force in a case like this where the parties are
11 trying to challenge not somebody else's tax liability but
12 somebody else's tax credit where they are trying to increase
13 the tax liabilities of third parties not before the Court.
14 An analogous case the case they cited to the Court the
15 Apache apartment case, Third Circuit where a similar case was
16 brought and somebody was trying to overturn tax credits
17 available for parties who are not before the Court and the
18 Fifth Circuit said there's very good reason we should not
19 adjudicate this. We would set off essentially chaos in the
20 Court of the Tax Administration if we tried to interfere with
21 the principle if the taxpayers and the Government litigate tax
22 liability.
23 THE COURT: What's the name of the case?
24 MR. MCELVAIN: Apache Bend Apartments.
25 THE COURT: Apache?

1 MR. MCELVAIN: A-P-A-C-H-E.
2 THE COURT: Got it.
3 MR. MCELVAIN: I'll turn next to the ripeness issue.
4 For similar reasons, none of the plaintiffs have a ripe claim
5 because the whole point is, their ultimate claim at the bottom
6 is that they seek to litigate matters of their ultimate tax
7 liability.
8 THE COURT: If you view this as an APA case, a
9 challenge to a regulation that's a final regulation, why isn't
10 that right?
11 MR. MCELVAIN: Well, look to the Cohen case, a recent
12 en banc case of the D.C. Circuit. Here this goes to the 703,
13 704, other forms of action argument, but I think that the
14 analysis is very similar.
15 That case involved a challenge I forget to the
16 procedures themselves of how the IRS administered tax refunds.
17 And the Court found that the case could proceed, it was an APA
18 action that could go forward. But they were very careful to
19 say that our reasoning could apply only in circumstances where
20 the suit is basically a challenge to the adequacy of the tax
21 refund remedy itself.
22 And there's a reason that you can only apply where the
23 matter of the IRS final agency action unrelated to the tax
24 assessment and collection. So the D.C. Circuit is very careful
25 to say where there is a matter going to the assessment of the

1 tax, you have the tax refund action that is an action that you
2 can bring under a separate forum proceeding that Congress is
3 providing under 703 and 704 the APA disclaims a pre-application
4 sort of a view of that sort of claim.
5 For similar reasons the ripeness argument goes the same
6 way. Ultimately at bottom their claim is we're potentially
7 subject to this tax. We should not potentially be subject to
8 tax for not qualifying.
9 THE COURT: When do they get to ask some court to
10 decide whether or not the regulation that the IRS issued is
11 inconsistent with what Congress intended when it wrote the
12 statute?
13 MR. MCELVAIN: After the tax is assessed under the
14 tax refund procedures that Congress provided they can come and
15 say --
16 THE COURT: Where do they go?
17 MR. MCELVAIN: Well they go to Federal District Court
18 for Federal claims.
19 THE COURT: Not to Tax Court?
20 MR. MCELVAIN: Actually this is not in our briefs,
21 but it occurred to me after writing the briefs that there may
22 be circumstances where they could go into the Tax Court if the
23 issue goes to the calculation of their income, that would be a
24 matter that the Tax Court could have.
25 There is a potential vehicle for them to go to the Tax

1 Court as well. That unfortunately is not discussed in the
2 briefs, but they certainly have the authority to go to the, the
3 power to go to the District Court and Court of Federal Claims.
4 THE COURT: Their choice?
5 MR. MCELVAIN: Their choice.
6 THE COURT: After they pay the tax?
7 MR. MCELVAIN: After they pay the tax.
8 THE COURT: So you can go to the Tax Court after you
9 pay the tax. It's assessed and you don't pay it.
10 MR. MCELVAIN: It's actually not assessed, but that's
11 a term of art issue.
12 THE COURT: In a normal tax case somebody is taxed if
13 they don't pay it, the Tax Court decides it, right? And if
14 they do pay it and then seek a refund, they come through the
15 District Court?
16 MR. MCELVAIN: Right, right.
17 THE COURT: When is this tax likely to be paid?
18 MR. MCELVAIN: So it would be on 2014 tax returns.
19 THE COURT: The employer's 2014 tax returns?
20 MR. MCELVAIN: Both.
21 THE COURT: Not 2015 but 2014?
22 MR. MCELVAIN: It would be before the year 2014 paid
23 in 2015.
24 THE COURT: I thought you said employees things were
25 deferred to 2014?

1 MR. MCELVAIN: Oh, I apologize. For the individuals
2 the 2014 tax year payable April 15, 2015.
3 For the employers it's deferred so the potential
4 liability would be for 2015 payable after that.
5 THE COURT: So it doesn't become ripe with respect to
6 the employers until 2015 after they pay under protest a tax or
7 decline to pay a tax?
8 MR. MCELVAIN: Correct.
9 THE COURT: This issue is not going to get resolved
10 for a long time in your view?
11 MR. MCELVAIN: Well, let's consider.
12 THE COURT: And lots of people are going to be
13 effected whereas if a Court, if a Court struck down the
14 regulation, everybody would know the rules of the game after
15 they went to the D.C. Circuit and after they went to the
16 Supreme Court and all of that which would probably get us to
17 2015 anyway.
18 So they would know the rules of the game or if a Court
19 upheld your view of the regulation you would have some
20 certainty, the taxpayers would have certainty and employers
21 would have some certainty after they went to the D.C. Circuit
22 and after they went to the Supreme Court.
23 MR. MCELVAIN: You know, I don't -- to be perfectly
24 frank, I don't think certainty is particularly lacking right
25 now. The Treasury has made a considered view. I understand

1 the plaintiffs have a different view. But it's not an issue
2 given today that we have that great concern for that would
3 justify a departure from ordinary principles of when tax refund
4 actions are brought, ordinary ripeness principles that allow
5 the ordinary administration of claims courts hearing claims
6 once and only once in the D.C. Circuit.
7 Consider the hardships of the ripeness claim. At bottom
8 Mr. Klemencic claims that he potentially faces the assessment
9 for a hundred dollar tax. The maximum amount that he would owe
10 under Section 508, for 2014 is $100. We cited a figure of $150
11 in our brief. It was my error and I forgot to include cost of
12 living adjustments to that figure. Either $150, the same
13 difference.
14 THE COURT: So the actual penalty for not --
15 MR. MCELVAIN: If he went without coverage for the
16 entire year of 2014, it's a maximum of one percent of his
17 income, the amount of his income that is over a certain
18 statutory threshold given his allegation that he projects
19 $20,000 of income for 2014, the amount of the threshold would
20 be, at most would be $10,000. I cited $5,000 in my brief. I
21 forgot to look at the cost of living adjustment. So at most
22 one percent of his income would be $100 for 2014. Again, the
23 number I cited in my brief is $150, I'm willing to use either
24 figure. That's for the year.
25 It's a monthly assessment. He could bring a test case

1 incurring one-twelfth of that amount for one month of the
2 penalty, so he would owe $12 or $8 or what have you for one
3 month of going without insurance to bring his test case.
4 THE COURT: Under your recent analysis by the agency,
5 if he had to buy insurance, and his choices are regardless of
6 what he said under the, in his complaint originally, are his
7 choices either to buy insurance under protest or to say I
8 refuse and be penalized?
9 MR. MCELVAIN: He can buy insurance if getting
10 insurance for free counts as buying insurance, he buys
11 insurance.
12 THE COURT: Well, under your scenario he gets the
13 subsidy so he gets free insurance or he declines it.
14 MR. MCELVAIN: Uh-hmm.
15 THE COURT: Under their scenario the subsidy doesn't
16 apply because this is a Federal created Exchange and therefore,
17 he has a choice of either buying insurance for $18 a month or
18 paying a penalty in your numbers of a hundred or a $150.
19 MR. MCELVAIN: No, a $150 dollars for a year.
20 THE COURT: I'm sorry, for a year.
21 MR. MCELVAIN: Correct. So I hardly think that makes
22 out a claim for hardship which further shows the fact that this
23 claim is not ripe.
24 Their argument there is well, maybe what I'll do is I'll
25 go ahead and buy insurance anyway. Actually, at the end of the

1 day he says we're not going to buy insurance. But their
2 initial argument is hardship. We're going to go ahead and buy
3 the insurance so we couldn't bring the tax refund action.
4 But the Supreme Court has dealt with claims like this
5 before Alexander v. American United said well okay, the tax
6 refund action is available to you. You may choose not to do
7 it, but that doesn't mean that it wasn't an available remedy in
8 your choice to forego, pursue that remedy does not mean that
9 that's not available or adequate.
10 So for purposes of ripeness and for purposes of 703 and
11 704 the analysis of what other forms of proceeding are
12 available to the plaintiff, they have a remedy available.
13 There's no hardship in pursuing that remedy, the amounts are
14 relatively small. So there's no reason for this action to go
15 forward at this time.
16 THE COURT: Okay.
17 MR. MCELVAIN: I would be happy to go on to the
18 merits. I don't know how the Court --
19 THE COURT: I thought we wanted to, you haven't
20 talked about the Anti-Injunction Act. Let's finish your
21 various hurdles that you say they can't overcome.
22 If they don't have Article III standing, you win your
23 motion to dismiss, right? If they don't have prudential
24 standing, you win your motion to dismiss, right?
25 So I think we should go through each of these arguments

1 that you may hear from Mr. Carvin on the other side about those
2 issues before we get to the merits, except to the extent that
3 the merits are relevant and they may not be relevant to any of
4 those arguments.
5 MR. MCELVAIN: So turning to the Anti-Injunction Act.
6 The Anti-Injunction Act 26 U.S.C 7421 bars the claim of the
7 business claim. At the end of the day what their business
8 plans are arguing is we're potentially subject to the Section
9 4980H tax. We don't want to be subject to that tax. The
10 Anti-Injunction Act says you cannot proceed on that claim.
11 Now a knowledge of the Fourth Circuit has said that the
12 Anti-Injunction Act would not apply to a 4980H challenge, but
13 we respectfully disagree with that Court's reasoning. Because
14 4980H specifically used the word tax to describe the assessment
15 that it was creating for large employers who don't provide
16 sufficient coverage to their employees, and the use of the term
17 tax is quite important.
18 That was the reasoning that was important to the Supreme
19 Court NFIB in its discussion of 5000A that that particular term
20 had not been used in 5000A. 4980H is quite different, it uses
21 the phrase specifically, that same terms it appears elsewhere
22 in the Internal Revenue Code.
23 THE COURT: Let me just interrupt you for one second
24 because I want to make sure that I got this in my mind
25 correctly.

1 You say you disagree with the Fourth Circuit. Is it
2 that you disagree or that the situation presented here is
3 different from the one presented to the Fourth Circuit?
4 MR. MCELVAIN: With respect to the Anti-Injunction
5 Act in particular, if this Court follows the holding of the
6 Fourth Circuit then, then that would answer our Anti-Injunction
7 Act argument.
8 So we are not distinguishing Liberty University. We are
9 saying that we respectfully believe that the Fourth Circuit was
10 wrong in that respect.
11 THE COURT: Let me ask this question then. Because
12 if that's your analysis, that's a fine approach.
13 So the Supreme Court dealt with the individual mandate,
14 right. And the Chief Justice's opinion explained why the
15 Anti-Injunction Act did not bar the case from going forward.
16 The Fourth Circuit dealt with the employer mandate and
17 because the phrase assessable payment was used throughout
18 except in two situations, one of which they said they didn't
19 fully get or understand the other which they distinguished or
20 said well, just one passing reference is enough.
21 This case involves a premium tax credit and so one way
22 to think about the Anti-Injunction Act, unless I'm just not
23 understanding the Fourth Circuit's opinion and its interplay
24 and reliance upon the Supreme Court's decision, is that because
25 this case is talking about a premium tax credit which is a tax

1 credit, not a penalty credit, not an assessable payment credit
2 that and uses the word tax every time it talks about tax
3 credit, i.e. a credit against taxes, why isn't it a simpler
4 argument for you to make than saying the Fourth Circuit's
5 decision applies but we disagree with it?
6 Now you guys both you and Mr. Carvin and his team
7 understand the statute a lot better than I do at this point.
8 So I don't want either of you to sort of lead me astray into
9 some thinking that just doesn't make any analytical sense
10 regardless of which side of the issue you are on.
11 MR. MCELVAIN: Right. I think we do need to go to
12 the next step and look at what the actual ultimate purpose of
13 the plaintiffs' pursue is. The business plaintiffs are
14 attacking the premium tax credit, they don't want the tax
15 credit to be issued, but the ultimate bottom line is to claim
16 the Article III standing is something that leads to this tax
17 being assessed against them.
18 If it were only the tax credit, then one difficulty the
19 Government would face would be getting around the language of
20 Winn which does not involve the Tax Reduction Act
21 distinguishing challenges to tax creditors versus challenges to
22 taxes.
23 So we can't stop there with the analysis but at the end
24 of the day, it doesn't matter the Government's position because
25 you look at what the ultimate bottom line is for the particular

1 claimant bringing the suit and the ultimate bottom line for the
2 business plan that is they don't want the 4980H tax assessing
3 and we do respectfully submit that the Anti-Injunction Act
4 doesn't apply to the 4980H Act, the Fourth Circuit contrary
5 ruling notwithstanding.
6 The 4980H does use some of the terms to describe the
7 amounts that would be assessed against the businesses, but it
8 also describes those terms as taxes and that textual use of the
9 term tax is very, very important under the NFIB in an uncommon
10 sense. The Anti-Injunction Act itself refers to any tax, any
11 challenge, any suit for the purpose of restraining, any tax.
12 Section 4980H imposes a tax, so it is one of the imminent taxes
13 in the Internal Revenue Code that the Anti-Injunction Act
14 refers to.
15 One further point with respect to the Fourth Circuit's
16 reasoning. They thought well, it would be anonymous. Why
17 would Congress have one rule for 5000A and another rule for
18 4980H. But in fact, there are no restrictions on liens or levy
19 or holding power applies to the 4980H tax unlike 5000A which
20 had some limitations on collections and given that one very
21 important purpose of the Anti-Injunction Act is not to restrain
22 those sorts of, those sorts of collection powers and makes
23 sense for Congress to treat the two differently.
24 If I could make one point. Earlier the Court referred
25 to the individual mandate, an employer mandate. I just wanted

1 to make a notation that I understand that that's common
2 terminology that's been used, popularly referred to, but in
3 fact they are misnomers. There is no such thing as individual
4 mandate tax. You either carry the qualifying insurance or you
5 pay a tax.
6 Same thing with the employer provision. There's
7 absolutely no provision that says you must offer insurance.
8 You either offer qualified insurance or there's a tax. It's
9 popular terminology to call mandates, but there really is not
10 that's the way the statute, either of the two statutes operate.
11 I would also like to turn to the indispensable parties
12 question also relates to the claims of the business plans.
13 What the plaintiffs argue well, there's no indispensable
14 parties here, we don't need the employees here because this is
15 like a public rights case and there is a law established that
16 says in public rights cases you don't need to bring any absent
17 parties.
18 But this is not like the typical public rights case
19 where you are seeking to adjudicate the rights of millions of
20 parties. Their claim is much more specific than that. Take
21 the claim of GC Restaurants, the one business plan who
22 attempted to show their standing. Their claim is specifically
23 we have 18 employees at our Golden Chicken Quick Service
24 Restaurant who would get the credit who we want to distinguish
25 those 18 employees so as to protect ourselves from possibly

1 owing the employer tax.
2 So there is a very specific identifiable discreet set of
3 people whose rights are at stake under the plaintiffs' theory
4 of the case, who we submit their rights can't be adjudicated
5 here.
6 But if somehow their rights could be adjudicated, it
7 would be fundamentally unfair for them for this case to proceed
8 in their absence. So for that reason there is an indispensable
9 parties issue with respect to the business plans.
10 And with that I would address special issues.
11 Should we move on to Mr. Carvin for the merits?
12 THE COURT: Yes, I think it makes sense. What I
13 would like to do unless either of you think, let's get through
14 all of the issues with respect to the motions to dismiss. Then
15 we'll take a break for ten minutes or so for the Court
16 Reporter's sake as well as for ours and then we'll come back
17 and talk about the preliminary injunction.
18 MR. MCELVAIN: Very well.
19 (Brief recess.)
20 MR. CARVIN: Good morning, Your Honor. I will start
21 with Mr. Klemencic, the individual plaintiff standing for a
22 number of reasons. If you find that he has standing you need
23 not even address the other party's standing.
24 I would like to begin by correcting the statement of
25 Government counsel. He said that our initial theory or in

1 Klemencic's declaration was that he wanted to buy catastrophic
2 coverage. The declaration that's attached to the opposition to
3 the motion to dismiss by Mr. Klemencic on page 2, first full
4 sentence says quite clearly, the certificate of exemption would
5 entitle me to purchase catastrophic insurance coverage or
6 forego all coverage without any fear of incurring a penalty.
7 So he was not clear at that time what he was going to do.
8 Then they came out with the rates and in the reply in
9 his declaration that we attached to the preliminary injunction
10 reply, he made it clear that having seen the rates he's decided
11 to forego all coverage. He's taking catastrophic off the
12 table.
13 So the dilemma for him is quite clear. The subsidy,
14 because of the subsidy he will be forced to engage in a process
15 and engage in a contract with an insurance company that he
16 neither needs nor wants.
17 Now that will cost him out-of-pocket. But I want to
18 emphasize and for reasons I'll get to in a moment, but I don't
19 think that that's essential for his standing because after all,
20 his freedom, he is being compelled to engage in activity. He
21 has got to go through the incredibly torturous process of
22 trying to get insurance in West Virginia which is apparently
23 impossible and will certainly involve at least weeks of effort.
24 And he will then be forced to contract with an insurance
25 company that he doesn't want to.

1 Now the Government says well, all of those problems are
2 cured by compelling to engage in activity that you don't want
3 to. Because we'll pay for your insurance at the end. But that
4 doesn't make any sense.
5 They can't cite one case where compelling American
6 citizens to engage in activity that is beyond the statutory
7 authority doesn't give rise to injury. For example, let's
8 assume the IRS said clear as could be anybody who makes less
9 than $30,000 doesn't even have to file a tax return. And the
10 IRS said no, everybody that makes 10,000 has got to file a tax
11 return. Now forcing you to file a tax return that you don't
12 want to exceeds the statutory authority business necessity the
13 injury that the statute was designed to avoid forcing you to
14 file a tax return if you -- let's assume that the law said you
15 don't have to file a tax return and the reg said you did.
16 THE COURT: Okay.
17 MR. CARVIN: It would still be requiring you to
18 engage in activity. At the end of the day, the IRS couldn't
19 say we're not going to take any taxes, it's the filing of the
20 return. Perhaps the best example of that the cases that the
21 Justice Department is currently involved with the Voter ID
22 registration.
23 In North Carolina for example, it doesn't cost you any
24 money out-of-pocket. They'll give you the ID for free, but the
25 Justice Department has argued all of the effort that it takes

1 you to get your birth certificate or to go to the office to get
2 the voter ID is sufficient injury to actually violate the
3 constitution, violate the Voting Rights Act.
4 Well, if it's sufficient to rise to the level of
5 unconstitutional deprivation of the right to vote, then surely
6 it's cognizable arguable injury.
7 In terms of the financial problems, even if you assume
8 their latest 11th hour revision of what they said when they
9 switched to $18 to zero, the truth is that Mr. Klemencic even
10 under the newly revised theory is probably going to have to pay
11 out-of-pocket and certainly runs a direct risk of that. They
12 are forcing him to gamble with his own money. Why is that?
13 Because the way the statute works is that the subsidies
14 are given to you on what income you project for 2014.
15 Mr. Klemencic is a floor, he does odd jobs. It's not like he
16 can identify on a GS 12 I'm going to be making this much.
17 Well, he projected $20,000. Well, if in fact he makes $21,000
18 then under the statute they can come back and get the subsidy
19 back.
20 And for reasons that I could present to you even if he
21 makes $21,000, even under the newly constructed theory, he
22 would have to pay out-of-pocket. So it's a razor thin argument
23 that they are making that he doesn't have to pay. If it's
24 already with you I'll give to opposing counsel and you just did
25 the calculations. These are my calculations, Your Honor, I'm

1 trying to help you out the best I can with these.
2 THE COURT: Thank you.
3 MR. CARVIN: I'll frankly just refer but the bottom
4 line of what you need to see is both based on declaration 1018
5 the last Friday 11th hour if he has actual income of $21,000,
6 he would be paying 390 a month and it goes up 25,000 he would
7 be paying $600 a year.
8 THE COURT: So basically if he is doing these odd
9 jobs if that's what he does, if he makes, he would like to --
10 MR. CARVIN: He sure doesn't want to stop at 20.
11 THE COURT: -- he would like to make more so if he
12 gets $25,000 of work in a year, it goes from zero all the way
13 up to $51.
14 MR. CARVIN: Exactly. These are figures straight out
15 of the HHS website.
16 I guess the point is that he does have to pay $18 a
17 month. The declaration they filed on September 27th made it
18 clear that he had to pay $18 a month.
19 They are now coming to this Court and said that new data
20 is available, and they had to revise their estimates. They
21 haven't identified what date is available and I can assure the
22 Court there is no new data that existed between September 27th,
23 virtually the day before they went on line for October 1st and
24 today. They haven't identified anything.
25 There's one insurer, health form in West Virginia. It

1 put in its rates in May which is the statutory deadline, so
2 there's no new information.
3 The other thing that the Court should be aware of the
4 reason they have been able to up their notion of how much a
5 subsidy Mr. Klemencic gets. Again I apologize for this, this
6 is minor. But the subsidy is tied to the second lowest cost
7 Silver plan offered in West Virginia, okay. If the cost goes
8 up, then the subsidy goes up.
9 They solemnly assured you under oath on September 27th,
10 the second lowest cost was $438 and 44, and therefore, the
11 subsidy was so small that he was paying $18. Then they come in
12 last Friday evening and say, you know what, jumped up $25 a
13 month. Somehow the second lowest cost is now $463. That's
14 what Mr. Mole swore to you under oath.
15 If you go on to HHS website as we did Friday morning and
16 this morning, it has the number in the September 27th Mole's
17 declaration. That says the second lowest cost plan is $438,
18 not the 463 that they have newly invented.
19 So either Mr. Mole and HHS is misleading the American
20 public. They have also told you how to calculate premiums on
21 the basis of this 438 number or they are misleading the Court.
22 I can give you both the website as of today from the
23 office that Mr. Mole is in, and if you go down to grading area
24 ten, grading area ten it said, Mole said ten, but it doesn't
25 matter, either for 9 or 10. If you go to the second lowest

1 cost silver QHP, do you see that in the lower right hand
2 corner?
3 THE COURT: Yes.
4 MR. CARVIN: It says 438, 44, that's the number that
5 was in the September 27th Mole's declaration. So there's no
6 date. Mr. Mole just woke up one day in consultation with the
7 Justice Department, decided to ratchet up the second lowest
8 silver plan to 463, so that they could make this argument about
9 how there's no out-of-pocket cost.
10 He also swore under oath that this information was
11 provided on the West Virginia Health Exchange to everybody,
12 that they were told on October 1st that the second lowest price
13 had gone up. That's not what the HHS website says but they
14 also have to answer two questions for this Court.
15 What happened between September 27th and October 1st
16 that they implemented this last minute change, and if they did
17 implement this last minute change, why did they wait three
18 weeks to the eve of this hearing to alert us and Your Honor
19 about this change? So no, there's no change in data.
20 What there is, is that Mr. Mole has made a litigation
21 specific decision to completely depart from what HHS policies
22 are, what HHS public policies are in a feeble effort to defeat
23 standing here.
24 And even if as minimum as you point out that's a
25 disputed fact that can't be resolved on a motion to dismiss.

1 Moreover, I think it can be rejected out of hand given the
2 obvious manipulation.
3 But finally, even if you accept all of this as true, it
4 will reconfirm Klemencic's disinclination to launch and expect
5 them to produce the subsidy. Because it's not only whether he
6 makes 21 or $25,000, they may wake up tomorrow and go back to
7 434 and which is on the HHS website and then he can be on the
8 hook for $18 a month.
9 So the key point is you have cognizable Article III
10 standing. If the Government shifts you from a guaranteed no
11 payments to a contingent liability, that's Clinton versus New
12 York, that's the line. New York has a dispute with HHS where
13 maybe they have to pay, maybe they won't. Congress passes a
14 law says no, you don't have to pay.
15 President Clinton vetoes that and therefore, it comes
16 back in. So they took, they had standing to challenge that
17 because the line on the veto took them from a certainty of no
18 payment which is the situation that Mr. Klemencic is today to a
19 situation where we might possibly have to pay down the road and
20 that contingent liability is enough to create standing. There
21 the only standing was that this would effect their financial
22 planning. Here they can go out and get insurance and make a
23 contractual commitment, so he's got a standing here.
24 Unless Your Honor has questions I'll switch to the
25 prudential standing issues.

1 Again, with regard to Mr. Klemencic. They make the I'll
2 use the term silly argument. If you disagree with the agency
3 on the merits, you can't challenge the agency. So the only
4 people who can challenge the agency are people who agree with
5 them on the merits and therefore of course would never sue the
6 agency.
7 They say Congress was interested in making a subsidy
8 affordable in federally established exchanges. We say on the
9 merits that's not true. Well, you can't accept their view of
10 the merits and therefore deny us our ability to make the
11 argument which is why of course for standing purposes you have
12 to accept our view of the merits.
13 Beyond that inherently silly argument, they make the
14 argument that Klemencic is somehow not effected by the subsidy.
15 But he is subject to the subsidy. He is subject to the subsidy
16 that triggers the individual mandate.
17 And every case Clark, ADP says if you're subject to, to
18 the subject then obviously you're within the zone of interest.
19 D.C. Circuit takes extensions that it's absurd to argue you're
20 not in the zone of interest if you're effectively regulated by
21 the statute which he is. He is being given the subsidy he
22 doesn't want because it forces him to engage in the activity
23 that he doesn't want to.
24 Obviously it is tied to the individual mandate, but the
25 subsidy is subject to him. If you look at the individual

1 mandate as even the Government agrees if the provision is
2 intricately related to the provision you're challenging, then
3 you're also within the zone of interest. So this argument
4 simply has no legs.
5 I will digress as a zone of interest at this point they
6 make the same argument how the businesses are not, are not in
7 the zone of interest. I will come back to this.
8 It is true that the businesses are saying we will be
9 subject to the employer mandate penalty if any of our employees
10 go on the Exchange. And therefore, they are not interested in
11 hurting employees, we keep calling tax credits, they're
12 subsidy. The way this works the Treasury cuts a check right to
13 the insurance company, people never see it. It's not a tax
14 credit in terms of their, it's a straight monetary transfer.
15 The reason they're challenging the subsidy is because
16 the enforcement scheme that the act did says if one of your
17 employees goes out and get a subsidy then this employer mandate
18 kicks in with respect to everybody. Then you have to pay the
19 enormous penalty if you are offering insurance. So the
20 relevant point is we are directly effected by the enforcement
21 of the scheme. It is as they say interrelated.
22 The tax we will have to pay, the penalty we will have to
23 pay is a direct consequence of one of our employees getting the
24 subsidy.
25 And the key point that I emphasize is that's how

1 Congress chose to enforce the law. They said look, we are
2 going to enforce the law. We're going to hang this sort of
3 damages over all employer's heads because we know they will
4 never run the risk that one of their employees won't get the
5 subsidy, so this will force them to give their employees
6 insurance and that's their injury. So they are clearly within
7 the zone of interest.
8 As to the timing of this suit, I have two points. They
9 are actually a little modest about how long this will take. As
10 I understand the scheme, what Mr. Klemencic has got to do, he
11 has to go to HHS, can you give me a certificate of exemption in
12 complete violation of your reg with the IRS. And then they
13 will say no.
14 Then he has got to wait until April 15th, 2015 if he has
15 chosen not to comply. Of course, if he has suffered that, then
16 he has got to pay them. Then for this $150 he is going to go
17 through the entire procedure and then eventually wind up in Tax
18 Court or some other place in like 2016.
19 Then by the time he gets to the Supreme Court it will be
20 2018. Add a year to that for each one of the employee mandates
21 because they won't have to declare until April, 2016 and that's
22 how they think we should resolve whether or not a regulation is
23 basically in conflict with the statute. Well, of course not.
24 The law is fairly clear. There's not a case out there as of
25 last, that doesn't say this a para-dynamic example of when

1 District Court needs to decide the process.
2 When the Government has created a dilemma for the
3 system. The citizen can either comply in which case he never
4 gets to go to the tax refund right, because he's done the
5 insurance or Mr. Klemencic bought the insurance or his employer
6 has provided the insurance or he can run the very serious risk.
7 The word sacrales potential risk in CBCE, it was any risk
8 potential of not winning, and then he has to pay.
9 Well, they say we don't put people to these choices.
10 It's better for the Government and for the plaintiff to know
11 before whether or not they have to comply. After all, because
12 this will create enormous coercive pressure on people to comply
13 and then never have this tax refund suit that they keep
14 hypothesizing.
15 That's a general rule. The specific rule is NFIB. NFIB
16 came into Court, challenged the individual mandate. They could
17 have gone through this bizarre procedure where they --
18 remember, if you will, they conceded that Mr. Klemencic is not
19 subject to the AIA.
20 After the Court decided the AIA didn't apply to them, it
21 didn't say well, you know, we really can't decide this now.
22 We're going to make everybody pay their taxes, everybody come
23 back to us in four years, we'll figure out whether or not the
24 individual mandate is law. So we know in this special
25 circumstance it is not the law.

1 They made the argument that with regard to paying this
2 tax so the normal rules for pre-enforcement with regard to
3 paying it's just the opposite. They have, Congress has told
4 you when you shouldn't decide pre-enforcement review. They
5 have enacted the Anti-Injunction Act. If you are outside the
6 Anti-Injunction Act, then obviously the Anti-Injunction Act was
7 not a nullity, you don't have to go through this Court through
8 this process of getting a tax refund. They seem to think that
9 the AIS doesn't mean anything.
10 There's some rule out there that you have a tax refund
11 and they can't explain why Congress bothered to pass the AIA in
12 the first place. That's why I was talking initially about
13 Mr. Klemencic.
14 Now I'll switch to the businesses, right. They keep
15 saying that they can do this tax refund suit that is not ripe.
16 But the businesses will never engage in an action refund suit.
17 You have a declaration from GC and Olde England. They're not
18 going to run this risk. They're going to give, they're going
19 to comply.
20 Under the D.C. Circuit's decision in State Farm, if it's
21 reasonable that you're going to comply, then you're ripe now.
22 They will never have a tax refund suit because they're not
23 going to make this enormous gamble. Again, in that regard I'll
24 emphasize that it was obviously reasonable for them to comply
25 since that is what Congress contemplated. Again, that's how

1 they triggered the employer mandate is whether or not one of
2 your employees will actually go to Court.
3 I would like to point out that even if you look at it
4 the wrong way. Even if you don't say the real injury here is
5 the compliance cause, the real injury here is the tax, right. I
6 think we keep saying which we're never going to pay. Even if
7 you make --
8 THE COURT: You are saying the real injury to the
9 employer is compliance cost?
10 MR. CARVIN: That's exactly right. They're going to
11 comply, cost them a lot of money to provide insurance. That's
12 the injury. It's not not complying and paying the taxes.
13 They're not going to do it.
14 But even just very quickly, if you hypothesize that they
15 are going to pay the tax we still have a ripe injury today and
16 I'll go back to my Clinton example, right. Right now they're
17 facing a very serious risk of a contingent liability. Will one
18 of their 18 employees who is completely eligible for a subsidy
19 go to the, go get it.
20 Well, why wouldn't they get it? Of course they're going
21 to get it. So we have a very serious contingent liability that
22 they will do it and then we will be hit with the taxes. And
23 the test is even under Clapper is substantial risk. Nobody can
24 reasonably argue particularly at this stage in the litigation
25 that there's not a substantial risk that one of the 18

1 employees is going to go get free federal money for an
2 important health service. So obviously, we've satisfied the
3 standing and ripeness for the employers.
4 Then they say, you know, we have got a ripe controversy
5 and we're suffering injury today, you can't address it because
6 under the APA if you invalidate a reg that the plaintiff is
7 challenging that somehow doesn't regress their injury.
8 If you tell HHS, IRS that they can no longer provide
9 subsidy in these states, you haven't entered an injunction on
10 these 18 employees. You have regressed our injury, you have
11 told us we don't have to pay the tax, we don't have to pay the
12 mandate so we're done.
13 Now you don't have to reach out to these 18 employees
14 and tell them not to go to HHS for the subsidy because you have
15 already told HHS the subsidy is not available.
16 Under their theory we could never decide a APA case
17 because all public laws effect people that are not before the
18 Court. But under their theory, when the states challenged the
19 medicaid provision, apparently the Court there had to join
20 everybody who gets medicaid or who would get it increased
21 medicaid and enjoined them from not asking.
22 No, everyone understands in the real world if a Federal
23 Court says to an agency this is not available, this is not a
24 reasonable interpretation of the statute, then it's done. The
25 controversy is over.

1 They say well, okay, all you are doing is invalidating
2 the reg and then somebody can sue under the statute. I don't
3 even understand that. If you invalidate the reg, it's
4 precisely because it's not a reasonable construction of the
5 statute.
6 Our argument is so that this is so unambiguous under the
7 Chevron prong one, no rational person could interpret State to
8 mean Federal. And if that's the reason that will be cited to
9 them when they try to convince a Federal Court de novo to
10 interpret State to mean Federal.
11 And this is, the cases are legion are all cited in our
12 brief. Kickapoo makes this clear. There's no inconsistency,
13 no chance for impermissible judgments for the reason I just
14 said, so that really doesn't work.
15 Then they with the businesses they pull out two
16 additional arguments to justify the businesses. The first is
17 they invent this rule that you can't, that there's an absolute
18 rule even if you satisfy all of the Article III and prudential
19 requirements that are normal. There's some rule that you can
20 never complain about a third party's tax liability.
21 Well, I get the point. There's a lot of cases out there
22 that say, listen like the case they cite tax analyst. If
23 you're a domestic oil supplier and you think they are treating
24 foreign oil suppliers better, you can't come into Court and
25 complain about some stranger's taxes that doesn't effect you

1 except, you know, perhaps competitive disadvantage. It doesn't
2 effect your relationship with the Government, right.
3 But again, that's, we're not trying to reduce, the
4 businesses are not trying to reduce their employee's tax
5 liability. They are trying to stop them from getting the
6 subsidy because it triggers their own tax liability.
7 It's not as if we are strangers to the employees. This
8 is the mechanism, this is the direct causal connection that is
9 set up in the statute and they recognize this. We recognize
10 this.
11 We cite Hibbs which says people can always complain
12 about third party taxes if it satisfies the normal Article III
13 requirement. Today in their reply the Government says oh, no,
14 Hibbs was referring to constitutional challenges, federal
15 statutory challenges for some reason has a different rule with
16 respect to third parties. And they cite the Levin case for
17 that.
18 They never explain why there's two different Article
19 IIIs, one for constitution and one for the statute and Levin
20 doesn't remotely state that. Please read the case. Levin
21 didn't involve a federal statutory challenge. Levin involved a
22 constitutional challenge.
23 The Court there said look, what they were trying to do
24 in Levin was get to raise somebody else's taxes, right. They
25 are saying it's a State tax, raise their tax in Ohio. And the

1 Court said look, if you are dealing with like an establishment
2 like clause case where you are saying deny them a tax
3 exemption, then that's one thing that the State can do. If you
4 are getting involved in raising somebody else's taxes, that's
5 something that we are going to defer to the State courts, after
6 all, it's a State tax issue. But there was never a federal tax
7 issue in Levin. So they just completely made up this rule.
8 Then today they tried out this Formige case and talk
9 about taxpayer liens, right. They say look these people have
10 direct property interest and they can't get involved. That's
11 because there's a specific statute governing taxpayer liens.
12 It says exactly what counsel tells us. If you challenge the
13 lien, you can't challenge the assessment. That is the statute
14 that is specific and doesn't apply here.
15 The argument quite frankly on Cohen in the D.C. Circuit.
16 I am not trying to be sarcastic, I generally don't understand.
17 If you read the cases and AIA, an anti-injunction case which
18 again their argument holding apart from the Anti-Injunction Act
19 this third party rule applies. So it's clearly our case not
20 there.
21 Finally, I will turn to the Anti-Injunction Act. And I
22 do think the case if there was any confusion in prior colloquy
23 we completely agree with what the Government said. With
24 respect to Mr. Klemencic, they agree that the Anti-Injunction
25 Act doesn't apply because he's challenging these premium tax

1 credits. And again, we keep calling them tax credits. They
2 are a check from the Treasury to the insurer.
3 So they agree that the premiums tax credits are outside
4 the Anti-Injunction Act because of the Hibbs case which my
5 colleague correctly cited which says that you can't challenge
6 tax reductions which that's at footnote page 7.
7 Of course, it makes sense right because the AIA says you
8 can challenge the assessments of collection tax, right. They
9 want to stop you from preventing money to go into the Federal
10 Treasury. Here we are in an odd position.
11 We are trying to prevent money coming out of the
12 Federal Treasury and the Anti-Injunction Act doesn't apply.
13 With respect to the business claims they do make the
14 argument not again with the tax credit or the subsidy but about
15 the employee mandate tax.
16 First of all, I'm not going to, you have already
17 obviously read Liberty University. We rely on their analysis
18 of the statute which seems to us to be at least a first cousin
19 if not the twin of the court's analysis in NFIB. I also point
20 out in Holly Lobby the Tenth Circuit had a similar challenge
21 the contraceptive mandate.
22 THE COURT: Right.
23 MR. CARVIN: It was also effected by the employer
24 mandate. In that case it is conceded that the Anti-Injunction
25 Act didn't cover it. So A, the Anti-Injunction Act says you

1 can't bring suits for the purpose of restraining the assessment
2 and collection of taxes.
3 And the Fourth Circuit have already said that that's
4 not a tax so it doesn't apply. Even if you disagree with that,
5 I would like to make a point that the purpose of our suit that
6 the business claim purpose of the suit is not to stop this
7 employer mandate. Well, they have joined the complaint. They
8 have the same complaint as the individual plaintiffs.
9 The purpose is to stop the subsidy. They have agreed
10 that the individual plaintiffs are not challenging anything
11 about the tax credits. Obviously, the business plaintiffs
12 can't have a different purpose in the same lawsuit as the
13 individual plaintiffs. It's the same complaint. And the
14 purpose of their lawsuit is not to stop the collection of the
15 employer mandate. It is to stop the subsidy which triggered
16 the employer mandate.
17 Now why do they care? Sure, the reason they care, the
18 reason they have Article III injury is because of the employer
19 mandate. But that's their motive. That's their interest.
20 It's not the purpose of the suit.
21 The purpose of the suit is to stop it and that's why it
22 completely distinguishes Bob Jones which I think they have
23 stopped relying on. There Bob Jones University was trying to
24 restrain collection of taxes, the taxes of people who are
25 making contributions to this tax exempt university.

1 Are there any additional questions? I believe I have --
2 THE COURT: I think I am very clear.
3 With respect to standing, so long as a single plaintiff
4 has standing, then the motion to dismiss can't be --
5 MR. CARVIN: Correct.
6 THE COURT: -- based on that.
7 But with respect to what we have just been talking
8 about, the Anti-Injunction Act, I do have to, even if Mr., even
9 if they concede that Mr. Klemencic has, that they, that the AIA
10 does not apply to him, I still have to deal with the AIA claim
11 with respect to the business plaintiffs or else I would wind up
12 granting their motion to dismiss in part.
13 MR. CARVIN: But I think that's the key message.
14 There is no such thing as -- the question is whether you have a
15 judicial case that Congress has not included through the AIA.
16 They say if you have got one plaintiff in front of you, you can
17 decide the case. Why spend a lot of energy figuring out the
18 other plaintiffs. Again, Klemencic is asking for the same
19 relief. You won't get into any different merits issue or
20 anything else.
21 THE COURT: I want you to answer this question and
22 then I want Mr. McElvain to answer the question. Some of these
23 predicate issues are harder to wrap your mind around than
24 others.
25 So if I were to conclude that Mr. Klemencic had standing

1 both Article III and prudential standing, is that all I have to
2 decide and the case goes forward?
3 MR. CARVIN: Yeah. The thing about it, let's say Mr.
4 Klemencic just come in himself. You do go ahead and decide the
5 case.
6 The fact that he had some free riders lagging behind him
7 doesn't effect your ability to adjudicate the case, right. So
8 I don't think that the Court is in a different position simply
9 because there are tag along plaintiffs. If you want to decide
10 business plaintiffs, I think we have got a great argument. I'm
11 just saying look, anything is true from this morning it is kind
12 of complicated.
13 THE COURT: And we haven't gotten to talk about the
14 statute which is really straightforward.
15 MR. CARVIN: In all candor, we need a decision right
16 away. Mr. Klemencic is arguing irreparable injury in the PI
17 motion. So yeah, we're focusing our effort on him. We have
18 got to show you that he has an irreparable injury and they get
19 to the merits for the PI.
20 We don't want the Court to take these needless detours for
21 the time and complexity unless the Court thinks it needs to
22 decide to exercise the power to adjudicate and I don't think
23 you do.
24 THE COURT: Okay.
25 MR. CARVIN: Thank you.

1 THE COURT: Mr. McElvain.
2 MR. CARVIN: I'm sorry. One other point just to
3 belabor you with one last, it's just a piece of paper.
4 It's not just that the HHS website has the second lowest
5 cost Silver plan I have. Their current pronouncement on the
6 website tells people that's how you calculate the tax credit.
7 It tells people like Mr. Klemencic that's how you do it and I
8 would like to hand that piece of paper up. The one piece of
9 guidance on that because I know these numbers are mind numbing
10 if you turn to page 8 of what we have handed up.
11 You don't have to do it now, but if you'll note when it
12 talks about West Virginia on page 8 of the HHS website, it's
13 got, it's got the tax credits for the lowest Silver before tax
14 credit which is 218 and that's the same as the lowest Silver.
15 So again, the point I'm trying to make, I know it's
16 complicated, it's not just that the declaration that was filed
17 on Friday contradicts what HHS says is the second lowest cost
18 Silver plan. It also contradicts HHS precise guide for people
19 like Mr. Klemencic on how they are suppose to calculate their
20 tax credit or subsidy.
21 THE COURT: Thank you.
22 MR. CARVIN: Thank you.
23 MR. MCELVAIN: Your Honor, with respect to the issue
24 of Mr. Klemencic's Article III standing just to be clear. The
25 declaration filed September the 27th was based on the

1 information available. Calculations were not yet complete at
2 the time. They were still working to finalize the numbers.
3 Now that we have the final numbers we have the new
4 calculations for you which are in the supplemental
5 calculations. We would have loved to file the declaration
6 before October 18th.
7 Recent events basically prevented us from doing so as
8 the Court is aware. There were limitations on what the
9 Government could do over the last couple of weeks. But this
10 entire dispute is simply irrelevant.
11 I am totally willing to use the $18 figure, that's fine
12 with me. I am willing to accept the $18 figure and the
13 analysis has not changed at all. The point is that Mr.
14 Klemencic at one time at least was willing to buy catastrophic
15 insurance at some price. If there is any doubt of that, look
16 at the last declaration ECF docket 31 paragraph one, the actual
17 insurance costs were not available, so I could not determine
18 with certainty at that time whether I wanted to forego all
19 coverage or purchase catastrophic coverage.
20 So he was willing to purchase catastrophic coverage at
21 some price. Now that the numbers are in, and he can get the
22 Bronze's coverage, better coverage for zero or for 18, again,
23 I'm willing to use the $18 figure, that's fine. All we need to
24 do is apply common sense and say well, if he was willing to buy
25 catastrophic coverage for something, he would be willing to buy

1 better coverage for the $18.
2 And the only reason that he's not willing is what he
3 said in his earlier declaration which is I object to Government
4 subsidies, I do not want to participate in a program where I
5 get subsidies. Fine, he believes that. I am willing to credit
6 that's his sincere belief. But that's a pure generalized
7 grievance. Simply the fact that you object to the fact that
8 the Government is giving you something is not the sort of
9 injury that states a cognizable injury that gives you an
10 Article III standing.
11 So the bottom line is he is getting a much, much better
12 terms than what he was willing, any plausible reading of the
13 pleadings much, much better terms than what he had at the
14 outset was willing to agree to and that's why he doesn't have
15 Article III standing.
16 THE COURT: What is the other argument that was
17 mentioned in the brief that -- I have to look back and see
18 whether it will be standing, that is sort of the liberty
19 interest or the freedom that if somebody is forced to enter
20 into a contract that he doesn't want to enter into and takes
21 certain kinds of action that is sufficient to rise essentially
22 to constitutional infringement on his liberty or freedom and
23 that's a sufficient injury in some circumstances for Article
24 III standing.
25 MR. MCELVAIN: But again, we have a plaintiff who was

1 willing to buy catastrophic coverage, so at some price he was
2 willing to pay for some figure coverage. Now that he knows
3 that the Bronze coverage is available for a 0 or the 18, the
4 $18 figure, the bottom of their claim is not I have this
5 absolute in all circumstances objection to insurance because I
6 -- it's that I was interested in buying this kind of coverage,
7 but if you put the label Bronze coverage on it, then I don't
8 want it with the preemptor with the Affordable Care Act. I
9 don't want it. That's why it's just purely a generalized
10 grievance. It's an ideological objection to receive a coverage
11 because it has a certain name attached to it rather than a true
12 Article III injury or a true cognizable injury.
13 The other thing they said with respect to standing now
14 we reject that it might project earning in a year may be
15 $25,000. That is true, that may effect the cost of the credits
16 at the end of the day. But again, we are nowhere near the
17 point where you can plausibly think that the claim that he
18 would not have wanted the catastrophic coverage at that time.
19 If he had come in the beginning and said I will never
20 buy insurance. I have this absolute ideological objection to
21 buying insurance, then we might have a different set of
22 circumstances.
23 He said I'm willing to buy catastrophic coverage if the
24 price is right but now you are telling me that even covers
25 available coverage for $18 and even if you take in the fact

1 that at the end of the day that might actually cost him $25 or
2 $40. I think you have to apply a certain level of plausibility
3 that his real objection here is not the cost of the coverage.
4 His real objection is that he has an ideological objection to
5 receiving subsidies and that is slimily not an Article III
6 injury.
7 It's very like in the Connell case where the plaintiff
8 said I don't want to participate in the system of receiving
9 contributions. And the Court said that's not Article III
10 standing, that's your choice but that's not what gives you
11 Article III standing.
12 Now turning to the question of the Redressability of
13 business plaintiffs claims for purposes of Article III
14 standing. They said well, you know, it doesn't matter because
15 you have redressed our injury. If you issue an order in our
16 case we win, but it doesn't work that way.
17 Because Section 4980H arises, tax assessment arises as a
18 matter of law if their employees receive the credit. So you
19 can't just say employer, you are free and clear. You would
20 have had to actually go further and attempt to adjudicate those
21 employees' rights to give them the relief they say here. And
22 that's exactly why --
23 THE COURT: The relief they seek here is and we're
24 saying that the regulation issued by the IRS is arbitrary,
25 capricious or otherwise violative of the loss so therefore, you

1 should set aside and vacate which is the relief that is
2 provided for in the APA.
3 MR. MCELVAIN: Which is now a rule that would be
4 binding on the employees in a lawsuit.
5 THE COURT: How is that different, what happens in --
6 I don't know, pick other examples, environmental regulations or
7 I don't know.
8 MR. MCELVAIN: But in another circumstance
9 environmental regulations, nobody says I don't like this smoke
10 stack height regulation. The Court says fine, you win. Then
11 that plaintiff wins, they don't have to have their smoke stack
12 at that height.
13 Their claim is very different here because they have to
14 specifically distinguish the rights of other people who are not
15 present here for them to get the relief that they seek.
16 THE COURT: What if EPA or FDA or somebody issued a,
17 whoever has jurisdiction, a regulation affecting smoking in the
18 work place, and the effects of secondary, secondary effect of
19 smoking in the work place, and the Court vacated it. It's
20 consistent with the records or the scientific evidence, you
21 name it.
22 But employees decided they still didn't like this. They
23 would be free to bring lawsuits, maybe they would be a nuisance
24 suit, I don't know what they would be in State Court. I can't
25 think of a Federal cause of action at the moment. But it

1 wouldn't, just because the Federal Judge threw out the
2 regulation it wouldn't extinguish the rights of the individual
3 employees to pursue their grievances. They could say that they
4 were harmed by the conduct of the employer.
5 MR. MCELVAIN: If there were the underlying statute
6 that said that the employee had the right to bring the claim,
7 then I, you know, there might be a Redressability circumstance,
8 probably in that circumstance.
9 But the point here is the employees have their own
10 claim. They could not be bound by this Court's judgment
11 because adjudicating them would not apply to those employees.
12 So it is very different from other kinds of APA actions.
13 Their entire claim depends on the notion that this Court could
14 issue a judgment that binds the employees. If this Court
15 doesn't bind the employees, they can still get the tax credit
16 and they're still under the threat of the tax assessment which
17 follows automatically as an operation of law if one of the
18 employees gets the credit.
19 That's why the claims is not redressable. So now what
20 plaintiffs' counsel has said well, it could be redressable
21 because what would happen if this Court issues a decision, then
22 that decision would be cited in the next future proceeding.
23 And that's a fair statement of what the ultimate
24 operation of any judgment in this case would be. It would be
25 cited in the next proceeding.

1 THE COURT: Nobody pays attention to District Court
2 Judges.
3 (Laughter.)
4 MR. MCELVAIN: But it still would be cited.
5 THE COURT: Yeah.
6 MR. MCELVAIN: But that's not enough to address
7 Redressability.
8 THE COURT: I once read an opinion saying don't ever
9 cite a District Court opinion to me, I don't want to have to
10 read all this stuff and it's not binding any way. He had no
11 regard for whether it might possibly be more persuasive in a
12 brief written by the parties in some particular, but that's,
13 but that's an aside.
14 (Laughter.)
15 THE COURT: Go ahead.
16 MR. MCELVAIN: But that's ultimately the point. Any
17 opinion, any decision reached in this case would have citation
18 value in the next proceeding and that is not enough to credit
19 Redressability.
20 THE COURT: I don't know how much value it would have
21 particularly whichever one of you loses, if it's an appealable
22 order you will go immediately to the D.C. Circuit.
23 MR. MCELVAIN: Which also wouldn't be binding because
24 the employees would render their claims in the states that they
25 live in.

1 THE COURT: That's probably true, but don't tell them
2 that.
3 MR. MCELVAIN: So turning next to the issue of
4 Anti-Injunction Act. One point that they raise with respect to
5 the Anti-Injunction Act with respect to the business plan,
6 Anti-Injunction Act because our purpose is not to stop the
7 employer, it's to stop the tax credit. For one point that's
8 contrary to what he just told you on the Redressability. You
9 can't have a purpose for one reason and have a purpose for
10 another reason to get an Article III. Their purpose is one or
11 the other.
12 But the purpose is how they plead the case doesn't
13 matter for purposes of the Anti-Injunction Act. At the end of
14 the day the reason why the business plans care about this
15 lawsuit is they think this will get them out from the 4980 H
16 tax.
17 It's wrong, we think that's wrong because we don't think
18 that they could get that really in the first place. But the
19 reason they are bringing the suit is for the purpose of gaining
20 it from the 4980 H tax. And whether or not they have actually
21 pled that they want this Court to issue an order enjoining the
22 4980 H tax doesn't matter.
23 Again, Alexander versus American United, a Supreme Court
24 case, the companion case to Bob Jones University which we
25 pretty much do rely on, which addresses this sort of claim. It

1 doesn't matter how you plead it.
2 The reason that you care about the lawsuit is the
3 purpose that governs whether the suit is for the purpose of
4 restraining the assessment or collection of an act. If the
5 only reason you care about it is you're potentially a subject
6 of the tax it most certainly does apply.
7 Turning next to the prudential issues. One of the
8 things that counsel has argued certainly this case is ripe and
9 certainly we shouldn't defer to Congress' choice of employment
10 action because we're faced with this dilemma. We're compelled
11 to comply and we should be forced to, to the Hopson choice of
12 either complying with the legal mandate or incurring this
13 liability.
14 But again, that goes to the point I raised before.
15 That's a misstatement of the way the statute operates. This is
16 no quote unquote legal mandate. There is a tax. You carry the
17 required insurance or you are subject to the tax. If you
18 provide qualified insurance to the employees and you are
19 subject to the tax.
20 There the law is quite clear, Bob Jones University and
21 similar cases that it's a perfectly eye opener to bring your
22 claim in and attack. That's the way the Internal Revenue Code
23 is set up. There is no Hobson choice of breaking the law in
24 the first place. You are not breaking the law, you are
25 choosing the behavior or potential of incurring the tax, much

1 like any other taxpayer.
2 THE COURT: You are breaking the law if you are not
3 paying the tax that you are subject to.
4 MR. MCELVAIN: Right. As to the behavior that
5 triggers the tax or ensuring the tax, you are not breaking the
6 law if you go the route of incurring the tax and that's an
7 important reason why the tax reform action is an important
8 remedy. You can bring the claim especially with Mr. Klemencic,
9 he can incur one penalty of $12 if he really does want to bring
10 this tax case in the refund action.
11 THE COURT: So your argument about why this isn't
12 just a straightforward APA case, that's one of your arguments
13 as to why this isn't a straightforward APA case.
14 The other is even if I vacated the regulation, it
15 wouldn't effect the employees?
16 MR. MCELVAIN: Right. So as to the business plans --
17 THE COURT: But that's not -- go ahead.
18 MR. MCELVAIN: As to the business plaintiffs, they
19 lack Article III standing because this Court could issue relief
20 which addresses their claim injury. Their claim injury is that
21 we face this threat of the tax assessment that we are terrified
22 of. They will still face the threat of the tax assessment
23 because the employees could come in and win their case and it
24 will trigger their taxes.
25 THE COURT: But why is that an argument that says I

1 don't have authority to set aside under the APA it's arbitrary,
2 capricious and contrary to law.
3 Is there any law that says that the Judge doesn't have
4 authority under the APA to set aside regulation as arbitrary,
5 capricious thus is contrary to law just because the Government
6 may still be able to impact other people with the same theory?
7 MR. MCELVAIN: Well, as an initial matter, when you
8 set aside an action you would be setting aside the potential
9 action for plaintiffs here, so in our view it's a misnomer to
10 say that you are setting aside the regulation in its entirety.
11 But you --
12 THE COURT: You told me a little while ago I thought
13 that in a typical APA action if a regulation is vacated, the
14 Government would apply and wouldn't try to impose that
15 regulation. I mean, I have seen situations although I don't
16 think most Judges like this, where, you know, the Justice
17 Department or some agency they represent wants to take a
18 totally different -- I have seen it in the INS -- they totally
19 want to take a totally different position in every Circuit and
20 then people have to litigate the same issue in every Circuit.
21 But you know, so I vacate, hypothetically I vacate this
22 regulation and the D.C. Circuit upholds me. And the Supreme
23 Court denies cert. The Justice Department and HHS are going to
24 be arguing to the Ninth Circuit, the Seventh Circuit, the Third
25 Circuit that they should just ignore the vacation of the

1 regulation and it still applies to taxpayers and to employers
2 in four Circuits but not in two other Circuits. I believe that
3 would create chaos in the administration of the Affordable Care
4 Act.
5 MR. MCELVAIN: That would be creating chaos. The
6 problem is not what the employers would do but what the
7 employees would do.
8 THE COURT: So my question -- We're spending a lot of
9 time on this.
10 My question is why is that a practical consequences
11 argument or it may go to your Rule 19 argument, but why does
12 that effect that argument in and of itself? It effects my
13 jurisdiction to set aside a regulation under the Administrative
14 Procedure Act if I find they have standing.
15 MR. MCELVAIN: Because if you set aside the
16 regulation, they don't get the regulation that they're seeking
17 because the employee can still come in in the second case and
18 say under our reading of the statute we win.
19 THE COURT: So it's a Redressability argument.
20 MR. MCELVAIN: It's a Redressability argument if the
21 employee wins, under the 4980H act arises as a matter of law.
22 There's a tax that says there's no such thing as a two
23 step process where you get in one case to a litigation issue
24 that is collateral.
25 What they're arguing here is we can get to overturn the

1 regulation so that they wouldn't be able to rely on the
2 regulation in the next case brought by the employees. Well,
3 even if that's true, they are still attempting to litigate a
4 collateral issue to what is actually at stake in the employees'
5 claims of the tax credits which again, this Court could not
6 bind the employees, even the D.C. Circuit could not bind those
7 employees.
8 THE COURT: Okay.
9 MR. MCELVAIN: If the Court has no further questions,
10 I'll --
11 THE COURT: I raise this question. I can't remember
12 quite how I phrased it to Mr. Carvin about if I were to find
13 that, I find that Mr. Klemencic has Article III and prudential
14 standing after finding that at least one of the plaintiffs have
15 standing, so I don't have to decide anything else; is that
16 right? I don't have to decide any other standing question if
17 one plaintiff has standing.
18 MR. MCELVAIN: No, I think you need to address the
19 standing of each plaintiff for each claim and --
20 THE COURT: Why?
21 MR. MCELVAIN: Because the Supreme Court authority
22 Lewis versus Casey and that a plaintiff must show their
23 standing, each plaintiff must show --
24 THE COURT: But if a single plaintiff has standing,
25 if standing were the only issue here, that you were raising in

1 your motion to dismiss, and there were 12 claims and one of
2 them had standing, you would lose your motion to dismiss,
3 right?
4 MR. MCELVAIN: In part, but you do need to address
5 the other plaintiffs.
6 THE COURT: Why?
7 MR. MCELVAIN: Because it would go to the ultimate
8 relief that you could or should --
9 THE COURT: Why do I have to address in a motion to
10 dismiss as opposed to say summary judgment later?
11 MR. MCELVAIN: Well, at some point in the proceedings
12 you need to address it but they are threshold issues for each
13 of the plaintiffs. So at some point in the litigation you need
14 to address --
15 THE COURT: If I decided that there was standing with
16 respect to a single plaintiff and that the issue was ripe for
17 determination with respect to at least one plaintiff, do I have
18 to deal with -- and you concede that the Anti-Injunction Act
19 doesn't apply to Mr. Klemencic; is that true?
20 MR. MCELVAIN: Correct.
21 THE COURT: So let's suppose I decided Klemencic has
22 standing, everything else except the anti-injunction, I still
23 have to decide the anti-injunction question with respect to the
24 business plaintiffs?
25 MR. MCELVAIN: Correct. Correct.

1 THE COURT: At this stage not the motion to dismiss
2 stage?
3 MR. MCELVAIN: It's a threshold issue, so I believe
4 you should. But anything else wouldn't change at summary
5 judgment.
6 THE COURT: The difference would be though that if I
7 decided that the case was ripe for determination and one of the
8 Plaintiffs had Article III and prudential standing the case,
9 the complaint would not be dismissed and then in the
10 plaintiffs' view, I would move on to decide the APA question.
11 In your view you would do two things on summary
12 judgment. One, you would raise all of these issues all over
13 again, but maybe we would have more factual development, and if
14 you are right with respect to some plaintiffs but not the
15 others, maybe they go away, but the case goes forward and then
16 I decide whether you're right under Chevron or they're right
17 under Chevron.
18 MR. MCELVAIN: If Mr. Klemencic needs to survive to
19 get to the preliminary injunction motion because he's the only
20 movant?
21 THE COURT: Correct. So I am not going to decide the
22 issue in the next ten minutes. So we are going with your
23 arguments on the preliminary injunction issue.
24 MR. MCELVAIN: But at the end of the day, we need a
25 ruling as to each of the plaintiffs because certainly at the

1 end of the day this is all academic if the Court were to issue
2 some order purporting to overturn the regulation --
3 THE COURT: You keep using the word enjoin and I
4 think vacating is different from enjoining. I'm using the
5 language of the Administrative Procedure Act. You are using
6 some other language.
7 MR. MCELVAIN: Fair enough. But whatever order the
8 Court --
9 THE COURT: Your colleague doesn't think it's fair
10 enough.
11 MR. MCELVAIN: But it's an academic point for this
12 issue which is, which is we don't think however it's phrased
13 leads to Redressability for the business plaintiffs but either
14 way we would need to know which plaintiffs the order, the order
15 applies to at the end of the day but of course, this whole
16 point can be rendered moot because none of the plaintiffs has
17 Article III or prudential standing or none of the dismissal
18 issues can apply across the board.
19 THE COURT: If I agreed with you on any of the five
20 or six issues that you raised, your motion gets granted if I
21 say there's no Article III standing, I don't have to go on to
22 the other issues.
23 MR. MCELVAIN: Correct. Some of the issues relate
24 only to the business plaintiffs.
25 THE COURT: I understand.

1 MR. MCELVAIN: But apart from that, yes, if we win
2 any of those we are done.
3 THE COURT: What I was trying to get at with Mr.
4 Carvin is whether I have to deal with each and every one of the
5 issues in order to deny your motion to dismiss, and that's sort
6 of what we have been talking about the last five minutes, okay.
7 So why don't we take about a 15 minute break. I hope
8 everybody is ready for a later lunch I think even if we go
9 late. Try to get through this.
10 (Recess at 11:45 a.m.)
11 (Proceedings resumed at 12 o'clock)
12 THE COURT: Okay, now we're ready to talk about the
13 preliminary injunction.
14 MR. CARVIN: Good afternoon, Your Honor.
15 THE COURT: My goodness, yes.
16 MR. CARVIN: We've thrown a lot of information at you
17 this morning. I think in terms of the likelihood of success on
18 the merits that this will be a very straightforward and argue
19 compelling and simple question of statutory interpretation.
20 We've put some boards up here just to help emphasize
21 what I think is obvious. When they, the subsidy provision
22 which is 36 B, when they were describing when the coverage is
23 available, when the subsidy is available, they said in the
24 plainest possible English through an exchange established by
25 the State under Section 1311.

1 They have the identical language in the provision that
2 tells you how to commute the amount of the subsidy. So when
3 they're dealing with the subsidy, when and how much and for how
4 long, it is quite clear that it only is triggered and only
5 applies if you're enrolled in the Exchange established by the
6 State under Section 1311. So that's the clear language.
7 We have an equally, this serves a sensible purpose.
8 It's not at all absurd. Indeed, it's a compelling purpose
9 which is Congress needed to, the Senate needed the states to
10 run the Exchange because Senator Nelson said that was a deal
11 breaker.
12 The Senate knew that they could not force the states to
13 run these Exchanges because that's unconstitutional. And they
14 knew they'd have to give them big incentives to run the
15 Exchanges because as recent events have proved, it's a very
16 controversial, very difficult task. And certainly in the red
17 states not one that they would gladly grab onto.
18 So what Congress did was make them an offer they
19 couldn't refuse just like they had done in Medicare. They said
20 listen, we'll give you, your citizens billions of dollars in
21 subsidies if you run the Exchange. And if you don't, if you
22 turn it down, then not only as the Government has quite
23 helpfully pointed out in it's briefs, it doesn't just hurt the
24 poor people who are eligible for the subsidies, it hurts the
25 wealthier people because the absence of the subsidies drives up

1 their premium and it hurts the insurance companies that are
2 running the exchanges because it makes insurance less
3 affordable for them as well.
4 So literally you would be alienated by not taking this
5 deal. You'd be alienating low income people, high income
6 people and businesses and Congress quite naturally thought
7 nobody could turn down that deal.
8 But now the IRS comes in and asks you to take the words,
9 Exchange established by the State under Section 1311, and say
10 -- well, what that means is Exchange established by the
11 Secretary, the Federal Secretary under Section 1321.
12 So they are asking you to interpret north to mean south.
13 They are asking you to interpret the statute to mean precisely
14 the opposite of what it says.
15 THE COURT: What the IRS said is in Exchange of
16 established either under 1311 or 1321, right?
17 MR. CARVIN: Yeah, so this language would apply. If
18 you want to revise the language that way, that's fine.
19 They could either say substitute out State and Section
20 1321, or revise it by adding established by the State under
21 Section 1311 or by the Federal Government under Section 1321.
22 But in either event, you are dramatically revising the
23 statutory language and you are undoing the deal.
24 And you are giving no incentives to the states to take
25 on this unwelcomed task and we've seen the result of undoing

1 those incentives. Thirty-six states have said they don't want
2 to do it, quite understandably.
3 So to rewrite this language, I mean, we could go through
4 each basic cannon of statutory construction. We can't render
5 language superfluous. You can't interpret this language to
6 mean as we indicated a minute ago, any Exchange established
7 under the Act because in 18032, they use that exact language,
8 when they're talking about coverage of Federal employees, they
9 say Exchange established under the Act.
10 And under Ruciello this shows that they know how to use
11 that language when they want to and they didn't want to use it
12 here. You can't interpret the language to mean well, sort of
13 anybody who runs an Exchange regardless of whether the State,
14 Congress just assumed you would apply it to them because when
15 they had that situation with territories under 18043, they said
16 treat territories as states. So they knew that they had to fix
17 these things. They had to give specific statutory language to
18 do it which is notably absent when they are talking about the
19 Secretary running these exchanges. So there's nothing in 36 B
20 would be our initial submission that in any way justifies the
21 IRS rule.
22 So they say well go to 1321. And 1321 is the provision
23 that kicks in when the states failed to establish the Exchange
24 as they're required to do under this, under 1311. And so they
25 say the statute telling you what happens when the states failed

1 to establish an Exchange is the statute that, is the same
2 provision that tells you that the feds can run the Exchange,
3 but all 1321 says is in the event that the State fails to
4 establish an Exchange, the Secretary will establish such
5 Exchange.
6 And we fully agree with the Government that means the
7 Secretary has got to run the same Exchange as the states would
8 have had they not defaulted under 1311. The difference is who
9 established the Exchange. Under 1321 it's clearly the
10 Secretary who did it because the State failed to do it. And
11 since the subsidy turns on who established the Exchange,
12 obviously the fact that it's the same Exchange doesn't matter.
13 What matters is who established it and there's no way to read
14 1321 other than to say the Secretary established it.
15 Then they say well okay, but Exchange, when you look at
16 the word Exchange, if you look at the definitional Section,
17 Exchange means Exchange established under 1311, okay. I'll
18 point out initially it's a bit illogical to say because the
19 definition of Exchange is Exchange established under 1311 that
20 helps their argument that the subsidy provision also applies to
21 the Exchange established under 1321. You would think actually
22 just the opposite.
23 But wholly apart from that inconsistency, we'll concede
24 that the definitional language says under 1311 and if you want
25 to literally interpret that, that means there's two kinds of

1 entities that can establish exchanges. One is the states under
2 1311, and one is the Secretary when it steps into the shoes.
3 But even accepting all of that, it's still a Secretary
4 established Exchange under 1311 is not an Exchange established
5 by the State under 1311.
6 So even if you take this circumvented route, it only
7 winds up with the fact that all Exchanges under 1311. We've
8 got Federal Exchanges under 1311 and we've got State Exchanges
9 under 1311.
10 After you have established that point, you go back to
11 the subsidy provision you say well, which one can offer
12 subsidies. It's only the ones established by the State under
13 Section 1311. So maybe the language in the definitional
14 section is a little awkward. Maybe it should have said
15 Exchanges that the states are obliged to establish under 1311.
16 Maybe that would have made it a little clear because they
17 assume that all of the states would be establishing it.
18 But however you eliminate that potential awkwardness
19 doesn't get you back to where the IRS needs you to get back to
20 which is somehow to say that an Exchange established by the
21 State under Section 1311 includes an Exchange established by
22 the Secretary under 1311. In fact, of course it's 1321.
23 THE COURT: So you basically got two arguments. One
24 is that the States established by the Secretary are not
25 established under 1311 at all, they're established under 1321,

1 but alternatively, even if there are Exchanges that are
2 established under, established by the Federal Government or by
3 the Secretary under 1311 when you look at 26 USC 36 B, what it
4 says is Exchanges established by the State under 1311.
5 So in your view you win either way. Either if the
6 Federal Exchanges are established under 1321 you win because
7 the only reference is to 1311 exchanges or if you accept the
8 notion that you can read some of these statutes to say that the
9 Secretary establishes exchanges under 1311, they're still not
10 Exchanges established by the State.
11 MR. CARVIN: Exactly. If you give palismatic
12 significance to the definitional section as they urge you to
13 because it says under 1311, you accept that and say okay, it's
14 an Exchange under 1311, but it's not an Exchange established by
15 the State under Section 1311. It's an Exchange established by
16 the Secretary under 1311 when the State fails to establish
17 their Exchange under 1311.
18 So yes, however you resolve that I'm perfectly fine to
19 say they're all 1311 Exchanges. It still doesn't get them
20 anywhere where they need to go to make subsidies available
21 under those Exchanges.
22 So apparently recognizing the weakness of the arguments
23 that are actually relevant here, they take you on a cook's tour
24 throughout the act which is a very complicated act and talk
25 about these other provisions, and they say if you accept our

1 argument, these other provisions would be absurd and if you
2 accept ours, so therefore, you must reject the plain language
3 of this provision.
4 Well, two points. First of all, they point to no
5 absurdity. And second of all, half of their examples have
6 literally nothing to do with the discussion we have just had
7 about how to interpret. It doesn't flow in any way, shape or
8 form. And I think maybe I'll walk through a few examples to
9 make these points clear.
10 The first absurdity argument is look, in the same
11 provision 36B, they detail a whole lot of reporting
12 requirements for Exchanges. The very provision that makes the
13 distinction between Exchanges established under, by the State
14 under Section 1311 then goes on to say you got to report a
15 bunch of stuff, premiums, coverage, names of the insured, that
16 sort of stuff.
17 They also say and include subsidies in it. They say
18 this means that Federal Exchanges must have subsidies. No. It
19 means that Congress has given a directive to State Exchanges
20 which have subsidies and Federal Exchanges which don't and it's
21 perfectly normal for them to say we're giving a blanket
22 directive to all 50 states on flooding and Nevada has got to
23 send in its report even though they don't have any floods.
24 They just give a general directive which everybody needs to
25 comply with.

1 It doesn't render it in any way superfluous or
2 non-sensical to say we are giving a general directive some of
3 which apply to Exchanges with subsidies, some of which don't.
4 But there's something for the Federal Exchanges to do under any
5 interpretation.
6 They make almost the identical argument for Exchange
7 functions where they list a number of functions about hot lines
8 and qualified health plans and stuff. One half of those deal
9 with subsidies of the 11 and again, it's the same argument.
10 But at the end of the day, our response is so what.
11 Yes, they did give general directions, not a hundred
12 percent of which apply to the Federal Exchanges without
13 subsidies. That doesn't mean Federal Exchanges can't provide
14 subsidies.
15 Then they go into fights about different language in the
16 act and they somehow attribute to us these dire, what they view
17 as dire consequences. Maybe the best example of that is the
18 abortion provision, 18023 says states can pass law prohibiting
19 insurance through Exchanges, that's the language it says. And
20 they say well, if you accept Klemencic's arguments that
21 Exchange means Exchange under 1311 that means states can only
22 prohibit abortion in states that run the Exchange.
23 Well, two responses. One is that's not our argument.
24 That's their argument. Their entire argument is premised on
25 the notion that Exchanges means Exchanges under 1311. So it no

1 way flows from what we have been discussing. It flows directly
2 from their argument which we accept, we don't resist. In any
3 event, it's not at all absurd to think that if states, if the
4 Federal Government is running the exchanges, the states have no
5 business prohibiting abortion on a federally run Exchange. I
6 would think the idea would be that if the States are running
7 the Exchange, then they have some say in what will be offered
8 but if they're not, then it doesn't.
9 A very similar argument with respect to the qualified
10 individuals definition that they make much of. To be an
11 individual qualified to go on an Exchange you need to give them
12 your name and prove that you're a resident, this is the
13 relevant language, a resident in the State that established the
14 Exchange.
15 They say well look, what happens if the State didn't
16 establish an Exchange, right. Well, three points. One is
17 everybody acknowledges that, that states didn't have to
18 establish Exchanges, that's why they had 1321.
19 So this problem exist regardless of anything you have to
20 say about subsidies, follow my point. If the State hasn't
21 established an Exchange, then there would be no qualified
22 individuals under anyone's interpretation of the statute.
23 Moreover, their interpretation of this provision doesn't solve
24 the problem that exists, right. Because they don't argue that
25 when the Secretary establishes the Exchange in West Virginia

1 that that is a State which has established an Exchange. They
2 argue that you should treat the Secretary like the State
3 established it.
4 So if you literally interpret this qualified
5 individual's provision they don't solve it because still
6 Mr. Klemencic is not a resident in a State that establishes an
7 Exchange under their theory or under our theory.
8 Finally, this entire dilemma is one that they have
9 invented out of whole cloth. Because when it says you need to
10 be a resident in a State that establishes the Exchange, it says
11 qualified with respect to the exchange. And as we have been
12 through probably three times now, Exchange means Exchange under
13 1311.
14 So this qualified individual's requirement only applies
15 to State run Exchanges under 1311. So everybody who is
16 qualified will be able to get in because it only applies to
17 States that have established the Exchange under the
18 definitional section.
19 Again, I could keep going on this. I'll make brief note
20 of two points that actually confirm our reading that the
21 Government uses as defenses. One is that there's a provision
22 that says the States have to maintain their current Medicaid
23 provisos until and unless they establish the State created
24 Exchange. They say it would be unthinkable to not allow them
25 to do it before then. But obviously, this was a big stick for

1 Congress.

2 They said look, if you want to change the Medicaid you
3 first got to set up the Exchange, we are giving you something
4 very valuable. Well, it makes sense from Congress'
5 perspective. If the state has said we are not going to give any
6 subsidies, the Feds are going to be running it, that means
7 nobody of, you know, relatively low income gets the money and
8 we're sure not going to let the States deprive the really poor
9 people of Medicaid on top of that. That makes perfect sense.

10 I think this probably won't move after the NFIB's
11 decision on what they could do in terms of coercing states
12 under Medicaid, but that's not here nor there.

13 Finally they focus on this global application form which
14 they think is somehow inconsistent with our reading but it
15 greatly reinforces it. It says that the Secretary will provide
16 each State with this information relating to subsidies again
17 confirming that the subsidies are available in State run
18 Exchanges, the State establishes Exchanges, not Federal
19 established Exchanges.

20 Since the statutory language doesn't work, that means the
21 statutory construction principle doesn't work, they go to the
22 last refuge of scoundrels of legislative history. And they say
23 --

24 THE COURT: Legislate administrative history is
25 relevant under Chevron step two. In other words, if the

1 statute is unambiguous, under Chevron step one, you don't look
2 at legislative history.
3 But if you have to go to step two to resolve the
4 ambiguity or to decide whether to give deference to the
5 agency's view of how the statute should be interpreted, then
6 you can look at legislative history.
7 MR. CARVIN: That is true except in Justice Scalia's
8 chambers, yes. In other words, yes, you can use all, yes under
9 step two you can use all of the traditional tools of statutory
10 construction. You can use that as a non-traditional tool, but
11 you're right.
12 Under prong one if it is ambiguous under Perk Cole and
13 other cases, legislative history is irrelevant. I point out
14 that if we ever get to prong two here, their argument is still
15 so unreasonable it doesn't satisfy prong two, but obviously,
16 we're making an unambiguous argument.
17 What is their legislative history? If they could pull
18 out a passage from the Senate Finance Committee report that
19 said you can make subsidies available on both State and Federal
20 run Exchanges it wouldn't matter because the language is
21 unambiguous. But they have not come up with anything which
22 even hints that that is what Congress was thinking about making
23 it available on both.
24 They are making a dog that didn't bark argument is how
25 they describe it. They say look, somebody would have talked

1 about this if this was really what was going on. The first
2 question is you don't ask whether or not Congress told you what
3 its purpose was. You ask whether the act serves the purpose.
4 You don't need any legislative history to confirm what is
5 otherwise obvious from the statute. But in the real world we
6 all know why they never drilled out and talked about what
7 happens if states default on it.
8 The House didn't even have State run Exchanges. It was
9 only the Senate and the Senate were all assuming as I said that
10 they were making an offer that they couldn't refuse. But they
11 were going to straighten all of this out in conferences.
12 The House bill was completely different than the Senate
13 bill in terms of Exchanges and a whole lot of other things.
14 When Scott Brown got elected, they couldn't go to conference
15 because they had to go under the budget reconciliation that
16 allows them to pass budget matters with 50 votes as opposed to
17 60.
18 So once that happened, they weren't discussing any of
19 these big picture items. The Senate except for some tweets in
20 terms of budget stuff the Senate floor was set in stone, the
21 House had to accede and that's why you didn't get any
22 conference reports discussing this kind of detail.
23 THE COURT: And your argument would also be the
24 reason you didn't have any is because everybody assumed that
25 this was an offer that was too good to turn down.

1 MR. CARVIN: Right. There's not a whole lot of
2 legislative history saying what happens if the states turn down
3 our Medicaid offer, then what do we do, and that would have
4 been a problem. Everybody thought, even though it turned out
5 not to be true after the Supreme Court, sure they've got to
6 take this deal and nobody thought otherwise.
7 They cite the CBO which was scurring and they were
8 scurring on the assumption -- they said they didn't do any
9 legal analysis, but they just went along with what everybody
10 assumed was the case.
11 They cite the Joint Committee on Taxation report, but if
12 you read it, every reference to subsidies and the money that
13 the Federal Government was going to have to pay talks about
14 State Exchanges. That's because they were all talking about
15 State Exchanges and that's what they were talking about.
16 So they can't give you any indicia of congressional
17 intent. Their last argument is just a naked policy argument.
18 They go on for four pages in the brief about again, this
19 wouldn't just hurt poor people, it would hurt wealthy people
20 because their premiums would go up and it would hurt the
21 insurance company's profits and therefore, they want you to
22 rewrite this because the judiciary just shouldn't tolerate that
23 because it was just clear that Congress wanted subsidies in all
24 of these Federal run Exchanges because they wanted subsidies in
25 all 50 states. I stipulate to that. They did want subsidies

1 in all 50 states, of course they did.
2 They had a question, how do we get the States to take on
3 this obligation from us. We have got to give them something.
4 They wanted Medicaid in all 50 states. We have got to put the
5 subsidies on the table to coerce them. That was their other
6 policy. It wasn't just getting subsidies in all 50 states. It
7 was enticing the states to run the Exchanges. Those were
8 pointing in two different directions.
9 They had to put the subsidies on the table as a huge
10 bargaining chip which may well have worked if the IRS hadn't
11 woken up one day and preempted this deal and then said to all
12 states you know what, if you take on the politically
13 controversial extraordinarily costly as recent events have
14 proven unbelievably complex job of implementing the exchanges
15 we will give you precisely nothing for doing it.
16 When you offer somebody nothing for a burden, the
17 reaction is 36 states say no thank you and that's exactly the
18 result that Congress was trying to avoid.
19 So I think implicitly what the Government is saying is
20 look, this is a really important law. We really need these
21 subsidies so we want the judiciary to write the law. I'm
22 obviously not going to lecture you on why we have an
23 independent and impartial judiciary but obviously, those are
24 extra judicial considerations and I won't dignify them further
25 unless I will turn to the other factors if it makes sense at

1 this point.
2 THE COURT: Let's talk about injury, irreparable
3 injury.
4 MR. CARVIN: Yes. So the irreparable injury again is
5 not unlike what I was talking about this morning is that
6 Mr. Klemencic is forced to a choice now.
7 THE COURT: But when is he forced to a choice? I
8 think there's some discussion about January 1st, 2014, there's
9 other discussion in the brief March 31, 2014.
10 MR. CARVIN: Technically under the regs he has got to
11 choose by December 31st. I think if people have talked about
12 March that is because you can comply with the individual
13 mandate if you get coverage for nine months. If you follow
14 what I'm saying. So he could game the system. I mean under
15 the regs he is suppose -- he needs a certificate of exemption
16 by December 31st. But he could technically not fall out of
17 compliance with the individual mandate. He could game the
18 system by waiting until February before he had to do it. But I
19 think that the certificate of exemption is required on December
20 31st and the individual mandate kicks in with full penalties by
21 the end of February.
22 THE COURT: Is it the end of February or end of
23 March?
24 MR. CARVIN: Well, he needs, you obviously can't show
25 up on March 30th and buy insurance for April. There is a lead

1 time which I think we roughly estimated at 30 days or so, I
2 think that's February 15th. I am now ably instructed because
3 obviously we have enough time to get the insurance.
4 So whether you say now or the next few months, the point
5 is he needs a decision well before this tax refund act, action
6 that is an entirely unrealistic tax refund action.
7 He has got two choices now. He can define the
8 individual mandate and go through this torturous tax regime or
9 he can comply with it. If he complies with it, he will never
10 ever be able to challenge it in court.
11 Again, case after case from Abbott Labs to Sackett has
12 said you are putting citizens in an impossible position if the
13 only way they can challenge an illegal or unconstitutional law
14 is by first defying it and then exposing themselves to
15 penalties. And Government can call a $150 tax or penalty,
16 whatever it is, I don't think that it really matters. For AIA
17 purposes it's clearly not a tax, but in all events the relevant
18 point is it's upon the paying of a monetary penalty.
19 And that's the basic point under irreparability, right.
20 If he does comply which he would have every incentive to do
21 rather than go through the absurd tax refund procedure, then it
22 is not irreparable. When he spends his $18 a month he can't
23 sue the Government for damages because they have got sovereign
24 immunity.
25 So while in a number of cases we say economic injury is

1 irreparable that doesn't apply if you are trying to go after
2 the Federal Treasury because you can't get it back from them.
3 And then in terms of the public interest, I mean, this
4 is just as clear a case as I think the Court can envision. If
5 the Court is convinced or reasonably convinced that this scheme
6 of the IRS is going to be struck down, it's clearly in every
7 one's interest, the Government's interest, our interest,
8 employers who are making decisions that effect their employee's
9 lives in a very tangible way to know this sooner, not in 2017
10 or 2018, they need to know it now.
11 That's because the Government is about to spend billions
12 of dollars so from their perspective it works. Employers are
13 about to make decisions about whether they let their employees
14 go on the Exchange or not. People in Mr. Klemencic's position
15 are signing up thinking that all of these subsidies are going
16 to be pouring in and it would be the cruelest possible bait and
17 switch to tell them in May or June or some other time, nope,
18 sorry, this has all been a big side show and it would be even
19 crueler if we did that in 2017 or 2018 as they just explained.
20 In light of that we filed this case in May. I don't
21 think there's any reason that the Court can't enter a final
22 judgment here. It's not as if their summary judgment
23 opposition is going to unearth some strange part of the statute
24 that they haven't already done.
25 If we think that procedural fairness requires it they

1 can file a summary judgment soon. But I really don't know and
2 I'm perhaps being excessively candid from either the
3 Government's perspective or our perspective, I have no
4 disrespect to the Court but this is ultimately going to be
5 decided by a higher court.
6 THE COURT: That's what I said earlier. Nobody cares
7 what I say.
8 MR. CARVIN: Well, I'm certainly not putting it that
9 way. We certainly care about whether we are appellant's or
10 appellee, we are going to be one or the other. I think it
11 would be cleaner and neater, it's a pure question of law. You.
12 You are putting a regulation next to the statute to have
13 a final judgment. If you have any concerns about the other
14 factors, that would be the course that we would urge on the
15 Court.
16 THE COURT: Thank you.
17 MR. CARVIN: Thank you very much.
18 THE COURT: Mr. McElvain.
19 MR. MCELVAIN: Good afternoon, Your Honor.
20 As I mentioned at the outset, the plaintiffs' theory is
21 fundamentally contrary to the tax purpose of the Affordable
22 Care Act and it should be rejected starting of course as you
23 should with the tax.
24 There are actually three independent routes that get you
25 to an understanding that what Congress meant was that the tax

1 credits would be available on all of the Exchanges, State and
2 Federal.
3 First, if you look at Section 36B in the language that
4 the plaintiffs refer to, the particular phrase Exchange
5 established by the state under Section 1311 of the patient
6 protection Affordable Care Act. Obviously, that can't be read
7 in isolation. You would have to turn to the relevant section
8 to understand what Congress was referring to.
9 If you look at Section 3211 which is 42 USC 18431, there
10 on the billboard that plaintiffs' counsel have hopefully
11 provided, right there in Section B it says each State shall
12 establish an American Health Benefit Exchange. So obviously,
13 that doesn't literally mean that each State shall because
14 States have those powers, so what does that language mean?
15 It means that the act that is creating a legal fiction
16 if you want to look at it that way, a legal fiction that every
17 State has established an Exchange. What happens if a State
18 doesn't do so because not, the States are not going to be
19 compelled to do so and there needs to be back up. Section
20 18041, Section 1321 of the Act tells you Secretary if the State
21 hasn't established the required Exchange, and that's the
22 phrase, the requirement refers back to 1803 1 that each State
23 shall, then the consequences, the Secretary shall establish and
24 operate such Exchange within the State.
25 So the Secretary stands in the shoes of the State. It

1 is the legal fiction stands that the State has established the
2 Exchange. The Secretary comes in to fill in the gap for what
3 the State is presumed to have done, but hasn't.
4 Second, if you need further confirmation of that point,
5 that's, that confirmation is provided by the definitional
6 provisions of the act itself. The Affordable Care Act defines
7 Exchange as a term of art. It means an American Health Benefit
8 Exchange established under Section 18031 by the code. So when
9 you plug that language into 18041, 21 of the Act, the Secretary
10 shall establish and operate such American Health Benefit
11 Exchange established under 18031.
12 THE COURT: Go back a second.
13 So you go to what's been codified as 42 USC 300 double
14 G-91 paren 20.
15 MR. MCELVAIN: Sub D, Sub 21.
16 THE COURT: D 21. And it says the term Exchange
17 means American Health Benefit Exchange established under 18031
18 and 18031 is 1311, right?
19 MR. MCELVAIN: Yes.
20 THE COURT: And 1311 is where we were a minute ago
21 which says that every state shall establish an Exchange and you
22 say that's legal fiction because they don't, haven't all done
23 it and that takes you to 1321C.
24 But where 300GG takes you to is to 1311. So I'm with
25 you so far.

1 MR. MCELVAIN: Yes.

2 THE COURT: So what do you say from there?

3 MR. MCELVAIN: So given that language that the

4 Secretary shall establish such American Health Benefit Exchange

5 Established under 18031, the language in 18031 is each State

6 shall, so the way to reconcile those phrases is the Secretary

7 is standing in the shoes. If you want to call it a legal

8 fiction --

9 THE COURT: I didn't call it that, you did.

10 MR. MCELVAIN: Sure. And I'm happy to stick with it.

11 The premise stands that the State has established an

12 Exchange and what happens if the State refuses to do so, the

13 Secretary steps in and stands in the shoes of a State for that

14 purpose. That is the entire premise of the structure of the

15 act and specifically of 18031 and 18041.

16 Now if there were any doubt after looking at the

17 interplay of those three sections and adding in the

18 definitional provision I think that's enough, I think that

19 answers the text.

20 But there's even a further textual confirmation in 36B

21 itself if you look at 36B Sub F which and 36B Sub F Sub 3.

22 Each Exchange from any person carrying out one or more

23 responsibilities of an Exchange under 18031 F 3 or 18041 C

24 shall report a variety of matters including the aggregate

25 amount of any advanced payments of the credit any information

1 provided to the Exchange including any change of circumstances
2 necessary to determine eligibility for an amount of such
3 credit. It specifically calls out the Secretary's operation of
4 the Exchange under 18041 because the Secretary is going to
5 report these matters necessary to determine the tax credit.
6 THE COURT: What it says is each Exchange or any one
7 carrying out of the responsibilities of an Exchange under
8 either 1311 or 1321 shall provide the following information.
9 MR. MCELVAIN: Correct.
10 THE COURT: Okay.
11 MR. MCELVAIN: And so the plaintiffs' response to
12 that is well, you know, it's not literally absurd, you could
13 put that forward and then the Secretary just couldn't do
14 anything, it would be compliance of that phrase. But the point
15 we are making is not that absurd result argument. We just are
16 making the more common sense argument what did Congress intend.
17 Would Congress have put this Section in there and
18 specifically called out the Federal Exchange and the operations
19 of the Federal Exchange to perform these calculations if they
20 were starting from the premise that the Federal Exchange
21 wouldn't be administering these tax credits in the first place.
22 That's why it fundamentally doesn't make sense. Not
23 that it's not impossible. It's certainly possible for the
24 Secretary to do nothing in compliance with that provision, but
25 it's a very, very powerful clue of what Congress intended is

1 that the tax credits would be administered in the Federal
2 Exchange.
3 THE COURT: Let me ask you this and I said this
4 before as I said to Mr. Carvin, you are much more familiar with
5 this statute.
6 His argument with respect to a number of statutes which
7 you wrote there, well there's nothing inconsistent with
8 Congress requiring Exchanges regardless of who created them to
9 provide certain information. And so I think he would argue
10 that your implication of this provision, 26 USC 36B paren F is
11 so what, it's not really relevant.
12 So my question to you not having studied this Section is
13 are these items about which information is required A through F
14 under subsection 3 all related to the subsidies that we're
15 talking about here today?
16 MR. MCELVAIN: I would need to consult with the
17 statute. May I have a moment?
18 THE COURT: Yes. In other words -- please turn off
19 your cell phones.
20 So the question is what I'm guess I'm saying,
21 Mr. McElvain, your argument gets stronger the more relevant any
22 of these items is, and the more of them the merrier, to the
23 subsidies that are at issue here. Otherwise, there's something
24 in Mr. Carvin's argument that they can ask for lots of
25 information some of which may be just useful to collect and

1 some of which may be useful to implement the statute.
2 Are these items directly relevant to implementing this
3 part of the statute?
4 MR. MCELVAIN: Sub C is and Sub F is. Those each go
5 to the credit or advance payments of the credit.
6 And the point is and again, this is not an absurd
7 results argument. It's not literally impossible for this
8 Section to apply. Under their theory the Secretary could
9 comply just by doing nothing. So it's not an absurd results
10 point. It's just a more common sense point of why would
11 Congress go to the trouble of specifically calling out the
12 Federal Exchange, specifically putting out this list where
13 three of the Fs, specifically relate to tax credits if what
14 Congress had in its mind was there would be no tax credits in
15 the Federal Exchange.
16 So again, if it's more of a common sense point and it
17 takes you to language of the D.C. Circuit Fund for Animals.
18 Well, if you're asking, if you're listing out essentially an
19 empty Act for the agency to perform, that's a powerful
20 indication that your interpretation of that provision is wrong.
21 It's the same principle that applies here.
22 So for those three reasons one, the interplay of 36B,
23 18031 and 1804, second the definition, and third, the operation
24 of 36B itself is a very, very, very powerful indication that
25 Congress meant for the tax credits to apply both for the State

1 and the Federal Exchanges.
2 THE COURT: Although your first two arguments are
3 sort of variances of the same argument.
4 MR. MCELVAIN: They work together to be sure, yeah.
5 But the point is that the Secretary stands in the shoes
6 of, of the exchange that the Act contemplated that the State
7 would create and in a sense directed the State to create. And
8 that's reflected in the definition.
9 THE COURT: One of the things that I found in your
10 brief that was less than helpful in my opinion, and maybe will
11 be fleshed out more in your summary judgment brief. You seem
12 to put a lot of weight in the language such, such Exchanges.
13 And the catch phrase stands in the shoes of.
14 And so I looked at the, there's one case that you cited
15 Judge Garland's opinion with Judge Kavanaugh dissenting
16 language, Clinton versus somebody or somebody versus Clinton.
17 I think is, are there more, are there cases that you would
18 really want to highlight in terms of -- I mean, your argument
19 is I think, both sides are arguing that Chevron step one is the
20 answer, I think. And that we don't have to get to Chevron step
21 two.
22 But in your case in either side's case you might be
23 wrong and I might have to get to Chevron step two. But what
24 are the cases that say okay, you don't just look at, you have
25 several cases. You don't look in isolation of just a phrase or

1 a clause in one sub part of a section of the statute. You have
2 to look at it in the context and that's what you have just been
3 talking about now. But are there cases that talk about such,
4 the use of the word such or stands in the shoes of in terms of
5 statutory construction principles?
6 MR. MCELVAIN: Sure and we cited them. There's the
7 Miller v. Clinton case from the D.C. Circuit.
8 THE COURT: That's the one I was thinking of.
9 MR. MCELVAIN: There's the recent D.C. Circuit case
10 -- I'm sorry, I mean the recent Seventh Circuit case, Alliance
11 3BL Corporation also cited in our brief such is essentially a
12 legalese term. That's a term the legislators use to let you
13 know they're talking about the exact same thing that they were
14 talking about before.
15 So to go through the same analysis in reverse order, you
16 start with that section, the Secretary shall establish and
17 operate such Exchange, you're suppose to go to the last
18 antecedent. What's the last antecedent? So it required an
19 Exchange. What does the phrase required Exchange mean?
20 Because it's not apparent just from that clause what that
21 means. You have to go back to 18031. What's the quote unquote
22 requirement that they are talking about. It's each State shall
23 not later than January, 2013 establish an Exchange.
24 So you can go run through the analysis forwards or
25 backwards, you get to the same result what is it referred to

1 is.

2 THE COURT: You make it even more complicated. I

3 have to go both forwards and backwards.

4 MR. MCELVAIN: I'm happy if you just do it one way,

5 pick one way and stick with it. But the bottom line it is the

6 same Exchange. It is the 10831 Exchange, that Exchange that is

7 referenced throughout the Act.

8 THE COURT: But even if you accept all of that, I

9 think Mr. Carvin is saying how do you get over the language

10 Exchange established by the state?

11 MR. MCELVAIN: Well, Exchange established by the

12 START State under Section 1311 and then you go to 1311 and

13 again it's that phrase; each State shall establish an American

14 Health Plan of exchange. So the entire point of the Act is

15 again, I'll use the phrase legal fiction. I hope that it

16 doesn't get thrown back to me, but the entire premise is the

17 state has established an Exchange. And under rules for what

18 happens if the Federal Government needs to step in in certain

19 circumstances, but the entire premise is there is the state

20 Exchange. And that's why Congress created a nationwide system

21 referring to exchanges in that manner.

22 Now we referred specifically to 36B and the particular

23 provisions cited in 36B. But the larger structure of the Act

24 confirms that as well. And I would like to highlight one

25 particular problem with plaintiffs' theory actually really,

1 really quite central to the operation of the act.

2 Under their theory not only the result would be not only

3 the tax credits are not administered in the Federal Exchange,

4 under their theory the Federal Exchange wouldn't operate at all

5 because there would be nobody who could be a buyer who would

6 eligible to participate.

7 A qualified individual under the Act, the Act defines the

8 phrase qualified individual to mean a person is eligible to

9 participate in the Exchanges and a qualified individual means

10 an individual who resides in the State that established that

11 Exchange.

12 So under our theory the Federal Government is standing

13 in the shoes. It's fulfilling the legal fiction that the State

14 has established the Exchange, the problem goes away. They're a

15 qualified individuals in every State.

16 But under their theory if there is no State operated

17 Exchange, there are no qualified individuals and the Exchange

18 just disappears in a cloud of smoke. That simply could not

19 possibly be what Congress intended to do in the Act.

20 Now their response to that is well, you know, you can

21 just ignore this because that's a problem under both theories.

22 But that's not true. That's not a problem under our theory.

23 The Federal Government is fulfilling the promise that the State

24 has established an Exchange. That's what Congress had in its

25 mind when it was using that phrase and so the system works.

1 But under their theory again, no qualified individuals, no
2 buyers, no plans to sell, nothing happens on the Exchange.
3 Now the other argument they say is well, if you look at
4 the text of 18032 the qualified individuals provision, it says
5 with respect to the Exchange and you can read that as just
6 applying to the state Exchanges and then the Federal Government
7 can just fill in the gaps for whatever might happen under the
8 Federal Exchange.
9 But I don't think that's a plausible -- if you look at
10 the text. I don't think that's a plausible reading of what
11 Congress meant. Congress would not have gone through all of
12 these details of establishing the Exchanges and created all of
13 these textual clues that the Federal Government Exchanges fall
14 into the same framework as the State Exchanges and then
15 silently take that away and say oh, all bets are off and HHS
16 can later fix it. That simply does not appear to be what
17 Congress intended to do.
18 Another important point on this and their argument is
19 you can fix the qualified individual argument. The difficulty
20 by interpreting that language only to apply to the state
21 Exchanges is they've contradicted themselves because on the
22 issue of abortion which has to do with the state's power to
23 issue abortion rules with State Exchanges, they've answered
24 that by saying well, you know, actually probably there it means
25 both State and Federal so the states probably do have that

1 power. Well they can't have it both ways.
2 In their brief the way they describe what the argument
3 they are presenting to you was that they were agnostic whether
4 Exchange meant State or Federal. Well, they can't be agnostic.
5 There are really fundamental problems that their theory would
6 create with the operation of the Affordable Care Act as a
7 whole. And if they had one route, they're creating one set of
8 huge problems. If they go another route they're creating
9 another set of huge problems. And again, they can't disavow
10 those problems by saying oh, we don't really care which way the
11 Court goes. There are fundamental inconsistencies with the
12 operation of the statute that arise no matter how the
13 plaintiffs end up describing their statutory theory.
14 Now speaking next to the legislative history.
15 THE COURT: Do you agree that only becomes relevant
16 if you get to Chevron step two?
17 MR. MCELVAIN: No. My understanding is there's
18 authority a legislative history can be used at step one, Brown,
19 Williamson and other similar cases, but I'm perfectly happy to
20 win at step two as well. That is something that I am happy to
21 win under either two or one. And certainly at a minimum we've
22 advanced at least a reasonable reading of the statute.
23 But here's the point on the legislative history. Both
24 plaintiffs and I have presented, have acknowledged the House
25 was proceeding on the assumption that there would be a National

1 Exchange and there would be tax credits on the National
2 Exchange. That was sort of a foundational part of the House's
3 version of the bill. There's certainly no question that at
4 least one House of Congress was absolutely on the record yes,
5 tax credits on the federally run Exchange.
6 THE COURT: What relevance is there of their bill
7 becoming law?
8 MR. MCELVAIN: Well, the point is the Senate passed
9 its bill and what plaintiffs say well, we don't care about what
10 the House thought because intervening events there was an
11 election of another senator and he had to go through
12 reconciliation instead of a conference where that might have
13 been sorted out. But that doesn't matter because the question
14 of whether tax credits applied or not was certainly a matter
15 the House could have raised at reconciliation if they wanted
16 to. It's a budgetary matter. So they certainly could have
17 raised it. And in fact they did actually address 36B in the
18 Reconciliation Act because they amended the amounts, they
19 raised it to the income level of 400 percent which would be the
20 amount that --
21 THE COURT: They being who?
22 MR. MCELVAIN: The House in their version of the
23 Reconciliation Act, inserted that and the Senate acceded to
24 that so that became part of the law.
25 So the House wouldn't have paid such close attention to

1 that issue, to the question of the amounts but then just
2 silently ignored the fact that tax credits were going away
3 entirely in some states.
4 Now the fundamental problem with the plaintiffs'
5 analysis of what the legislative history is there's just no
6 history at all on their side. This would have been a major,
7 major component of the Affordable Care Act structure if
8 Congress intended to take away the tax credits from some of the
9 states. It would have been discussed. It would have come up
10 and they have cited to nothing. There's no language anywhere
11 in the statute whatsoever where any legislative history that
12 the idea was even being considered let alone considered and
13 rejected.
14 And last week in the reply they cited to an Article from
15 the Harlen Texas News. I encourage the Court to click on the
16 link of the web page provided you can read it. It says
17 absolutely nothing at all about whether tax credits would be
18 available under the national Exchange.
19 The only other piece of evidence that they cited again
20 in their reply brief was the colloquy before the Senate Finance
21 Committee. I encourage the Court to consult the source. It
22 says absolutely nothing at all about whether tax credits would
23 be available on the National Exchange. The only two items that
24 they purportedly dug up do not even remotely say what they have
25 cited.

1 But most fundamentally in addition to the tax and the
2 structure of the Act and legislative history there is the point
3 that Congress' purpose would be fundamentally undermined under
4 plaintiffs' theory. Congress was well aware that the tax
5 credits were absolutely essential to the operation of the
6 exchanges. You need the credits to encourage healthy people to
7 come in for the exchanges to operate, to keep premiums low, to
8 expand coverage.
9 Now plaintiffs' counsel says well, yeah, we agree
10 they're all essential and are very important and they actually
11 would be significantly hampered if we win, but the Court should
12 just ignore that because the Court shouldn't rewrite the
13 statute. First of all, the Court is not rewriting the statute
14 as we've explained under the text.
15 The better reading of the statute is that tax credits
16 are available, but it's also more common sense point; what did
17 Congress intend? Did Congress intend to insert a time bomb
18 under the Affordable Care Act that would dramatically hamper
19 its effectiveness subject to the veto of a state.
20 Now their answer to that is yeah, we think Congress
21 intended that, not citing to anything that, anything at all
22 contemporaneous except that Congress did consider that but they
23 said Congress intended because they needed incentives for the
24 states to set up the Exchanges.
25 Well, you have to assume that Congress had no other

1 incentives to offer when in fact they did. They had
2 appropriations. There's money available to the State to set up
3 State Exchanges. There was the point that the Federal
4 Government would operate the Exchange in the absence of a State
5 operating Exchange and regulatory authority would flow from
6 that. So there certainly were incentives for the States to
7 operate the Exchanges.
8 The notion that Congress had to go further and create
9 this enormous carrot or enormous stick of taking away the
10 operation of the Exchange entirely, taking away this
11 extraordinary valuable tax credit available to the citizens of
12 particular states simply doesn't make sense.
13 And certainly if such an enormous step were going to be
14 taken, you would expect Congress to express that point, explain
15 what it's doing not only in the legislative history, but have
16 explained what it was doing to the states so the states knew
17 that this was the intended purpose of the Act was as opposed to
18 hunting for a great interpretation two years later down the
19 road.
20 So for those reasons the tax structure, the history and
21 purpose, the Federal reading of the statute is that tax credits
22 are available in all of the Exchanges. Certainly a reasonable
23 meaning, certainly we prevail under Chevron step one or step
24 two.
25 Turning now to irreparable injury. This whole

1 discussion of course can be rendered moot very quickly if you
2 go to the irreparable injury.
3 THE COURT: If you lose the motion to dismiss it's
4 not moot, it's just postponed.
5 MR. MCELVAIN: Correct, correct. But in terms of
6 specifically the preliminary injunction motion, it's quite
7 clear that they can't show irreparable injury.
8 Their claim at bottom is that Mr. Klemencic is subject
9 to a potential assessment under 5000A for not carrying
10 qualified insurance. Even if he goes without insurance for a
11 year is $100. Again, I cited 150 in the brief. I'm happy to
12 use the 150 figure or you can even go one month and owe 12
13 bucks or whatever for one months worth of penalty. That is not
14 irreparable injury. Monetary harm alone is not irreparable
15 injury. Even in cases where remote, not remotely like this
16 case where monetary injuries have been balanced to rise to the
17 level of being irreparable, they are great, they are certain,
18 they threaten the possibilities that the plaintiffs' business
19 could survive if they take that sort of hit. An $18, $12, $100
20 penalty that they may owe 12 months down the road is simply not
21 even close to irreparable injury under that sort of analysis.
22 They say well, it's irreparable because there's this
23 mandate and we are obliged to comply with the law. And you
24 can't force us of not complying with the law. The entire
25 argument is being presented as if the NFIB decision from the

1 Supreme Court ever happened. The Supreme Court in the NFIB
2 very clearly said that 5000A is a tax provision. If you don't
3 get insurance, you're, you're still in compliance with the law.
4 You just owe a tax.
5 So it's a, it's not a choice between complying with the
6 law and being penalized like in Sackett or Escarte young or
7 some of the other decisions that they cited. You are in full
8 compliance with the law if you go the route of not buying the
9 insurance, you are just subject to a tax and you can pay the
10 tax at a later date.
11 So for that reason it's quite clear that there's not
12 even remotely a case for irreparable injury here, and the PI
13 motion can be denied on that ground alone.
14 Just to briefly on the remaining factors if I may.
15 THE COURT: Before you get to the remaining, let's
16 talk a little bit about the timing. I want to be clear on what
17 happens with this particular plaintiff or whatever his
18 obligations or penalties on December 31st versus March 31st
19 versus February 15th.
20 We've got a date for enrollment if he wants to, if he
21 chooses to enroll -- wants is the wrong verb. A date for
22 enrollment if he chooses to enroll. We've got a date by which
23 he must obtain a certificate of exemption if the lawsuit comes
24 out in the way where he would still be exempt.
25 What are the relevant dates?

1 MR. MCELVAIN: So the open enrollment period goes to
2 March 31st for this year. Future years it will be a little
3 shorter period, for this year it will be March 31st.
4 In theory the 5000A tax penalty could kick in for the
5 failure to have qualified coverage in January, but there is a,
6 there's a three month exemption.
7 You have to have, there's a short coverage gap exception
8 from the tax penalty. So you have to have gone for insurance
9 for three months in a row for you to be subject to the tax
10 penalty.
11 So actually the first month that somebody could
12 potentially be subject to the tax penalty would be March and if
13 you have coverage by February 15th, you will have coverage from
14 March, so in that sense February 15th is the date. But
15 remember, what happens if you go without coverage for March you
16 would incur one months worth of the tax penalty which in
17 Mr. Klemencic's case is $12 or $18, but take the $12 figure, a
18 very low figure.
19 THE COURT: What about the certificate of exemption
20 if somebody qualifies for that?
21 MR. MCELVAIN: He can apply for the certificate of
22 exemption at any time up to the end of the enrollment period,
23 up to March 31st.
24 THE COURT: So up to March 31st?
25 MR. MCELVAIN: Correct. And they would apply

1 respectively after that. The certificate of exemption is just
2 that, a certificate. He doesn't need that to litigate his
3 potential tax liability later. He can just go straight to the
4 tax refund action and claim I shouldn't have been subject to
5 this $18 penalty.
6 Just very briefly on the remaining factors. There's an
7 inherent harm to public interest from preventing an agency in
8 implementing a regulation that Congress has charged it with.
9 The plaintiffs have argued that it's an enormous public
10 interest in proceeding with this case now to get an answer to
11 their question, but for the reasons we've discussed before
12 they're not going to get the answer to that question now. You
13 get a ruling with respect to one plaintiff that wouldn't bind
14 other plaintiffs. So they would be injecting chaos into this,
15 they would not be removing uncertainty from the system.
16 Particularly in the case that right now they are seeking a
17 preliminary injunction. A preliminary injunction certainly
18 could not resolve anything.
19 THE COURT: But what could provide an answer
20 particularly for these plaintiffs is a ruling for summary
21 judgment. They could file a motion for summary judgment and I
22 enter an order staying your obligation to respond. To expedite
23 I can deny the motion to dismiss, we could expedite the motion
24 for summary judgment.
25 MR. MCELVAIN: The Court has the discretion to do so.

1 I think that there's no need to expedite for the same reasons
2 that there's no irreparable harm. We're just talking about,
3 you know, a $100 penalty. But certainly if we proceed to
4 summary judgment, I definitely do want a second brief. There
5 are points that I would have loved to respond to in briefing.
6 THE COURT: You haven't responded at all to the
7 motion for summary judgment.
8 MR. MCELVAIN: No, correct.
9 THE COURT: Except in the context of the preliminary
10 injunction papers.
11 MR. MCELVAIN: Correct, but that's the point is that
12 we would need additional briefing.
13 THE COURT: Okay.
14 MR. MCELVAIN: I have nothing further.
15 Thank you, Your Honor.
16 MR. CARVIN: Your Honor, you show amazing patience
17 and I'll try not to test it. But I do want to go through what
18 I think opposing counsel called the legal fiction, it's
19 certainly fiction. I don't think it's very legal.
20 He focuses on the words the states shall create
21 something under 1311 as if that brings anything to the table.
22 But remember, the words such Exchange which appear in 1321 and
23 the entire premise of 1321 is that the state has not done it.
24 In other words, the Secretary never steps into the shoes
25 unless the state has not done it, unless the fiction is gone,

1 right. The fiction that the state is obliged goes away because
2 they knew was a fiction and they said well, what happens if
3 they don't adhere to our non-binding command. Well, here's how
4 it works.
5 Well if that's the section we're talking about, you
6 can't say that Congress thought when they were authorizing the
7 Secretary to establish Exchange in lieu of the State
8 establishing the Exchange that they were somehow saying that
9 the state was establishing the Exchange.
10 You went through the reporting requirements with him and
11 two points on that, 36B F 3. One is they expressly contemplate
12 Exchanges under Section 1311 or 1321. So they knew there were
13 different Exchanges and they knew they were listing reporting
14 requirements for both of them.
15 And to answer Your Honor's question directly A, B, and D
16 have nothing to do with subsidies and it would be binding on
17 the Federal Exchanges under our theory.
18 The alternative would be to create this okay, now we'll
19 have, now we'll create a separate section and we'll have one
20 with all six of these and then we'll have another one with just
21 three of them. That's just a wasted page.
22 So this tells you nothing other than reconfirming that
23 Congress thoroughly understood the difference between 1311 and
24 1321 Exchanges and was issuing a list as they say which both
25 Exchanges have to comply with.

1 The, you asked about the word such and I will just
2 briefly. I don't care if you call it such or I don't care if
3 you call it the. The point is that the Exchange is the same.
4 We all agree with that.
5 But the point for the subsidy provision is that the feds
6 are stepping into the shoes to borrow their formulation. Well,
7 if you're stepping into somebody else's shoes that means you
8 are somebody different than the person in the shoes. So when
9 the feds step into the shoes, it is no longer an Exchange
10 established by the State. It's an Exchange established by the
11 feds because the State didn't establish it.
12 So whatever cathedral they want to erect around the word
13 such it doesn't get them anywhere near where they need to go.
14 This qualified individuals point. Again, why they think
15 this flows from our argument as opposed to theirs. This says
16 you are not a qualified individual unless you reside in the
17 State that establishes Exchange. It is common ground between
18 us that the State didn't have to establish the Exchange.
19 And under their theory, it's not the State establishing
20 the Exchange, it's that you'll treat the federally established
21 Exchange as the State established Exchange which doesn't solve
22 this problem.
23 So I guess what they mean by if you adhere to their
24 theory they win. Their theory at a certain level of generality
25 is ignore the statutory language so they can win every argument

1 by ignoring this statutory language like they're ignoring that
2 statutory language.
3 But if you want to get off the horns of this dilemma
4 it's really simple. It says the term qualified individuals
5 with respect to an Exchange. An Exchange we both agree means
6 an Exchange under 1311 which means that this only applies to
7 State Exchanges which are the ones that have the subsidy.
8 So, there's just no problem at all. They keep saying
9 that's our argument oh, because we said we're agnostic. Maybe
10 I should clarify. I'm agnostic as to every legal issue that
11 doesn't effect this one. But we have never resisted the notion
12 that Exchanges under 1311 that Exchange means Exchange under
13 1311. We're perfectly happy with that.
14 In terms of prong two, whether we are at Chevron prong
15 two. I will just briefly point out that even if we're there,
16 they can't have in the words of the D.C. Circuit, they can't
17 make nugatory certain restrictions in the statute. That's
18 Chevron prong two, that's AFL CIO, 409 F.3d, 377. If you could
19 also look at Massachusetts v. DOT, 93 F.3d 890.
20 The point is ambiguity gets you to the second prong, but
21 they've still got to reasonably resolve the ambiguity. So even
22 if we want to say this isn't the best written statute in the
23 world, there's always some ambiguity, great. But the way they
24 resolve it has to also be reasonable whether we're under prong
25 one or prong two.

1 Legislative history, your colloquy with opposing counsel
2 confirms what I said which is it doesn't add a whole lot, but
3 we are not relying on it, but I will make two points.
4 Mr. Jost, one of the principle architects to this. The guy who
5 was invited to the White House signing ceremony proposed
6 exactly this. It's in our briefs. Said look, the best way to
7 accomplish this is to condition these subsidies on it.
8 They say would they ever have done something this major
9 without talking about it, but they miss the point that we
10 repeated ad nauseam which is nothing major got done in the
11 reconciliation because nothing major could get done because all
12 you could do with these minor things.
13 In terms of irreparable injury, I will only point out
14 yet again that all of his arguments assume that Mr. Klemencic
15 is going to define the individual mandate and he keeps saying
16 it's a tax so what do you care. Well, a $150 dollars is a
17 $150. And number two, for AIA purposes it is a penalty which
18 is the language that they use.
19 I know you can read NFIB, I'm pretty conversant with the
20 opinion. No, they definitely said that penalties were taxed.
21 But my major point is that they assume that he doesn't mind
22 paying the penalty. That's not at all true. And if he does
23 give in to the Government coercion, then he is out of court
24 permanently.
25 And yes, it is a $150 to Mr. Klemencic but it's tens of

1 billions of dollars to Federal taxpayers, and I think to shrug
2 it off and say don't worry about this case because it's no big
3 deal really begs it's reality.
4 Thank you, Your Honor.
5 THE COURT: Anybody else need to say anything?
6 (Pause.)
7 THE COURT: So if everybody is free tomorrow at ten,
8 I'll give you an oral opinion. Does that work?
9 MR. CARVIN: Yes, Your Honor, thank you.
10 THE COURT: So I'll see you at ten o'clock tomorrow
11 morning.
12 (Proceedings concluded at 1:07 p.m.)
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1 CERTIFICATE

2 I certify that the foregoing is a true and correct
3 transcript, to the best of my ability, of the above pages, of
4 the stenographic notes provided to me by the United States
5 District Court, of the proceedings taken on the date and time
6 previously stated in the above matter.

7 I further certify that I am neither counsel for, related
8 to, nor employed by any of the parties to the action in which
9 this hearing was taken, and further that I am not financially
10 nor otherwise interested in the outcome of the action.

11

12 __________________________ _______________________
/s/Crystal M. Pilgrim, RPR Date: November 26, 2013

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/s/Crystal [1] 114/12

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